

Submission to the Legislative Council Public Accountability Committee

“Inquiry into the budget process for
independent oversight bodies and the
Parliament of New South Wales”

18 November 2019

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Introduction

The Committee's Inquiry

The Public Accountability Committee of the Legislative Council (the **PAC**) is conducting an inquiry into “the budget process for independent oversight bodies and the Parliament of New South Wales”.

Its terms of reference require it to inquire in particular into:

- (a) Options for enhancing the process for determining the quantum of funding of the following bodies, including the transparency of the process:
 - (i) Independent Commission Against Corruption (**ICAC**)
 - (ii) Law Enforcement Conduct Commission (**LECC**)
 - (iii) Audit Office of New South Wales (**Audit Office**)
 - (iv) NSW Electoral Commission (**NSWEC**)
 - (v) NSW Ombudsman, and
 - (vi) Parliament of New South Wales (Legislative Council and the Department of Parliamentary Services).
- (b) Any other related matter.

The Committee is to report by the last sitting day in April 2020.

Structure of this Submission

The NSW Ombudsman's Office welcomes this inquiry and is pleased to provide this submission to assist the PAC in its deliberations.

We have focused this submission as follows:

- (a) the need to consider a different budget process for the independent oversight bodies (**Part 1**),
- (b) weaknesses of the current budget process (**Part 2**),
- (c) a brief survey of some alternative budget processes that apply to Ombudsman elsewhere (**Part 3**), and
- (d) key considerations that would be relevant to the design of an enhanced budget process (**Part 4**).

The Ombudsman would be happy to assist the Committee further, including by commenting on any other options that have not been specifically identified in this submission, as requested.

The NSW Ombudsman

The creation of Ombudsman offices in Australia was one of a number of administrative law reforms aimed at ensuring that expanding executive power was exercised lawfully, reasonably and fairly.

The first Australian Parliamentary Ombudsman office was established by statute in Western Australia in 1971. This was followed in other States and Territories, with New South Wales establishing its Ombudsman in 1975. Each of these offices still exists, and each still has the same core function it was given when first established.¹ The establishment of Ombudsman offices was followed in the coming decades by the introduction of other, more specialist integrity bodies, such as anti-corruption commissions and police misconduct bodies.²

Parliamentary Ombudsmen have been described as the “classical watchdog”.³ However, while there is a common core Ombudsman model centred around complaint handling and investigation of public sector or publicly-funded bodies, the range and type of functions performed by Ombudsman’s offices differs across jurisdiction and across time.

For the NSW Ombudsman, complaint handling still makes up the majority of our work. Annually, we receive over 40,000 contacts, most of which are from members of the public. Of those, around half are ‘complaints’ within the meaning of our governing legislation.⁴

Today,⁵ the NSW Ombudsman’s principal functions include the following:

Complaints and investigations about the conduct of public authorities

- (a) To receive (in writing or orally) complaints about the conduct of public authorities,⁶ which include:
- all departments and other public service agencies and their staff
 - statutory bodies and their staff
 - Ministerial staff (but not Ministers)
 - local government authorities and their staff
 - corrective services facilities and youth justice facilities
 - universities established under NSW legislation, and
 - other bodies required to keep accounts auditable by the Auditor-General.⁷

¹ Creyke R, Groves M, McMillan J and Smyth M, *Control of Government Action*, 5th ed, 2019, at 229.

² Auditor Generals pre-date the NSW Parliament, but the statutory Audit Office was established in 1984. The ICAC was established in 1988. LECC was established in 2017, when it assumed functions that had previously been undertaken by the Ombudsman and the Police Integrity Commission (itself established in 1996).

³ Giddings P, “Chapter 8: The Parliamentary Ombudsman: A Classical Watchdog” in Gay O and Winetrobe BK (eds.) *Parliamentary watchdogs: at the crossroads*, 1st ed, 2008.

⁴ See NSW Ombudsman, Annual Report 2018-19, available at <https://www.ombo.nsw.gov.au/__data/assets/pdf_file/0006/74283/NSW-Ombudsman-Annual-Report_2018-19.pdf> at 12-13 (19,436 in-jurisdiction complaints received in 2018-19).

⁵ This list excludes the employment related child protection (ERCP) functions under Part 3A of the *Ombudsman Act 1974*, which are expected to be transferred to the Children’s Guardian under the Children’s Guardian Bill 2019 (currently before the Legislative Council).

⁶ s 12 *Ombudsman Act 1974*.

⁷ s 5(1) *Ombudsman Act 1974*.

- (b) To assist in the resolution of complaints, including by referral, conciliation or mediation,⁸ by the making of preliminary inquiries,⁹ and by the provision of information and comments to the public authority.¹⁰
- (c) To investigate¹¹ the conduct of public authorities (whether or not any complaint has been made) where it appears to be conduct of the kind referred in in section 26 of the *Ombudsman Act 1974*,¹² including conduct that is:
- contrary to law
 - unreasonable, unjust, oppressive or improperly discriminatory
 - based wholly or partly on improper motives, irrelevant grounds or irrelevant considerations
 - undertaken without giving reasons (when reasons should have been given).
- (d) To report on investigation outcomes to the relevant public authority and Minister, including by making recommendations that:¹³
- the conduct in question (eg, a decision taken) be reconsidered
 - action be taken to rectify, mitigate or change the conduct or its consequences
 - reasons be given for the conduct
 - any law or practice relating to the conduct be changed
 - compensation be paid
 - any other step be taken.

Monitoring and assessment of Aboriginal programs

- (e) To monitor and assess prescribed Aboriginal programs – the first of which is the Government’s OCHRE plan for Aboriginal affairs.¹⁴
- (f) To report on those Aboriginal programs to Parliament and the Minister.¹⁵

Monitoring of disability reportable incidents¹⁶

- (g) To receive notifications from the Department of Community and Justice (**DCJ**) and service providers funded by DCJ of disability reportable incidents (such as sexual offences and misconduct, assaults, ill-treatment, neglect or unexplained serious injury in relation to a person with a disability in supported group accommodation).
- (h) To monitor investigations by DCJ or a DCJ-funded provider of reportable incidents,¹⁷ and to investigate any inappropriate handling of or responses to reportable incidents.¹⁸

⁸ s 13A *Ombudsman Act 1974*.

⁹ s 13AA *Ombudsman Act 1974*.

¹⁰ s 31AC *Ombudsman Act 1974*.

¹¹ Investigations are “made in the absence of the public”: s 17 *Ombudsman Act 1974*.

¹² s 13 *Ombudsman Act 1974*.

¹³ s 26 *Ombudsman Act 1974*.

¹⁴ Part 3B *Ombudsman Act 1974*.

¹⁵ s 25N *Ombudsman Act 1974*.

¹⁶ With the transition of services to funding under the National Disability Insurance Scheme, it is anticipated that the Ombudsman’s remaining functions here will effectively cease from the end of 2020.

¹⁷ s 25U *Ombudsman Act 1974*.

¹⁸ s 25W *Ombudsman Act 1974*.

- (i) To keep under scrutiny the systems of DCJ and of DCJ-funded service providers for handling and responding to reportable incidents.¹⁹

Community services complaints, review and monitoring

- (j) To receive (in writing or orally) complaints about the conduct of community service providers,²⁰ being:
- DCJ
 - certain providers of ageing, disability and other community services funded by the NSW Government²¹
 - authorised carers of children in out-of-home care, and
 - providers of assisted boarding houses.
- (k) To investigate such a complaint if it involves the kind of conduct referred to in section 26 of the *Ombudsman Act 1974* (see (c) above)²² or if it:
- raises a significant issue of public safety or public interest, or
 - raises a significant question as to the appropriate care or treatment of a person by the service provider.²³
- (l) To review and report on the systems of community service providers for handling complaints.²⁴
- (m) To review, on application or on the Ombudsman's own initiative, the situation of a child in care or a person in care (or a group of such children or persons).²⁵
- (n) To promote and assist the development of community service standards and to educate service providers, clients and others about those standards.²⁶

Child Death Review Team

- (o) To convene the Child Death Review Team, which among other things:
- maintains a register of all child deaths in New South Wales
 - analyses data to identify trends and patterns in those deaths
 - undertakes research to help prevent or reduce the likelihood of child deaths
 - makes recommendations as to legislation, policies, practices and services to prevent or reduce the likelihood of child deaths,²⁷ and
 - reports biennially to Parliaments on its analysis and research.²⁸

¹⁹ s 25Q *Ombudsman Act 1974*.

²⁰ ss 11(1)(f), 22 and 23 *Community Services (Complaints, Reviews and Monitoring) Act 1993*.

²¹ ss 4, 21 and 22 *Community Services (Complaints, Reviews and Monitoring) Act 1993*.

²² s 24 *Community Services (Complaints, Reviews and Monitoring) Act 1993*.

²³ s 27 *Community Services (Complaints, Reviews and Monitoring) Act 1993*.

²⁴ s 14 *Community Services (Complaints, Reviews and Monitoring) Act 1993*.

²⁵ s 13 *Community Services (Complaints, Reviews and Monitoring) Act 1993*.

²⁶ s 11(1)(a) and (b) *Community Services (Complaints, Reviews and Monitoring) Act 1993*.

²⁷ s 34D *Community Services (Complaints, Reviews and Monitoring) Act 1993*.

²⁸ s 34G *Community Services (Complaints, Reviews and Monitoring) Act 1993*.

Child and Disability Death Review

- (p) To receive notifications and maintain a register of reviewable deaths, being deaths of children at risk of harm, children in care, or people with a disability in care.²⁹
- (q) To monitor and review such reviewable deaths,³⁰ and to undertake research with a view to formulating strategies to reduce or remove risk factors associated with preventable reviewable deaths.³¹

Oversight of public interest disclosures scheme³²

- (r) To promote public awareness of the *Public Interest Disclosures Act 1994 (PID Act)* and to provide information, assistance and training to public authorities.³³
- (s) To issues guidelines on the application of the PID Act.³⁴
- (t) To monitor and report to Parliament on compliance by agencies with the PID Act, and to undertake and report on compliance audits.³⁵
- (u) To convene the PID Steering Committee, which provides advice on the operation of the PID Act and recommendations for reform.³⁶

Special reports

- (v) To make special reports to Parliament on any matter arising in connection with the discharge of the Ombudsman's functions.³⁷

The NSW Ombudsman has a staffing establishment of 128 non-executive staff.³⁸ Executive staff comprise five statutory officers (including the Ombudsman) and two directors (Corporate and Legal).

The NSW Ombudsman's Office has been informed that it can expect to receive budget funding in 2020-21 of around \$23 million.³⁹

²⁹ s 36 *Community Services (Complaints, Reviews and Monitoring) Act 1993*.

³⁰ s 36 *Community Services (Complaints, Reviews and Monitoring) Act 1993*.

³¹ s 36 *Community Services (Complaints, Reviews and Monitoring) Act 1993*.

³² Complaints received by the Ombudsman may also themselves be public interest disclosures (PIDs) that must be dealt with in accordance with the *Public Interest Disclosures Act 1994*. In 2018-19 we received 140 PIDs: NSW Ombudsman, *Annual Report 2018-19*, available at <https://www.ombo.nsw.gov.au/__data/assets/pdf_file/0006/74283/NSW-Ombudsman-Annual-Report_2018-19.pdf> at 7.

³³ s 6B(1)(a)-(b) *Public Interest Disclosures Act 1994*.

³⁴ s 6B(1)(c)-(d) *Public Interest Disclosures Act 1994*.

³⁵ s 6B(1)(e) and (f) *Public Interest Disclosures Act 1994*.

³⁶ s 6A(2) *Public Interest Disclosures Act 1994*.

³⁷ s 31 *Ombudsman Act 1974*.

³⁸ Again, excluding staff of ERCP who are expected to transfer shortly to the Office of the Children's Guardian. See fn 5 above.

³⁹ This does not include funding to be appropriated for the purposes of the employment related child protection (ERCP) functions, which are expected to have transferred to the Children's Guardian before 1 July 2020. This amount also does not include around \$500,000 of revenue which the Ombudsman's Office expects to receive through the provision of training services provided on a fee-for-service basis.

Part 1: The need to consider a different budget process for the independent oversight bodies

1.1 The independent oversight bodies

The PAC's terms of reference refer to the five bodies – ICAC, LECC, Audit Office, Ombudsman and NSWEC – as “independent oversight bodies”. For simplicity we have adopted the same term in this submission, although we do so as a term of convenience rather than a taxonomic category.

This is because neither the property of “independence” nor of “oversight” necessarily delineates what is unique about this group of offices and what (in our submission) warrants their being subject to a modified budget process. For example:

- (a) None of these bodies is, or should be, entirely independent in the sense of being accountable to no-one. As creatures of statute they are subject to legal limits as circumscribed by the terms of their governing legislation and, ultimately, they are accountable to Parliament (as the source of that legislation) and, through Parliament, to the people.
- (b) The Government can and has chosen to establish various other officers and bodies that are more or less at arms-length from Ministers and other Government officials. These officers and bodies may be given some degree of functional and statutory autonomy in order to protect them from the risk of political interference.

An example might be the Independent Pricing and Regulatory Tribunal. Other officers, such as the Director of Public Prosecutions also require independence in order to perform their essential functions, but those functions are of a different nature to the core integrity institutions, and do not involve holding the Government to account or otherwise enabling or assisting the Parliament in the discharge of its functions.

- (c) Not all of the functions of these bodies are appropriately described as “oversight”. The NSWEC, for example, does not just oversight elections: it also runs them.

1.2 The concept of ‘Parliamentary statutory offices’

There is a close connection between the group of entities described by the inquiry's terms of reference as “independent oversight bodies” and the concept of a ‘Parliamentary Statutory Office’ that has developed in a number of Australian and overseas jurisdictions.⁴⁰ The author of a Commons Library research paper suggests that the concept of “officer of the House” was developed in the twentieth century to apply to the

⁴⁰ See eg: Gay, O, *Officers of Parliament – A comparative perspective*, House of Commons Library Research paper 03/77, 2003, available at <<http://researchbriefings.files.parliament.uk/documents/RP03-77/RP03-77.pdf>>; Ferguson L, “Parliament's Watchdogs – New Zealand's Officers of Parliament” (2010) 25 *Australasian Parliamentary Review* 133, available at <<https://www.aspg.org.au/wp-content/uploads/2017/09/12-Ferguson-ParliamentsWatchdogs-ANZAcatt08.pdf>>.

then new “constitutional watchdogs” and that it has come to denote a special relationship of accountability to Parliament and independence from the Executive.⁴¹

An alternative perspective suggests that these bodies (and perhaps others) should now be considered to constitute a fourth branch of government – an “integrity branch” – that is functionally distinct and institutionally separate from the traditional executive, legislative and judicial branches.⁴² This perspective builds on the observation that the functions of the oversight bodies appear in some respects to straddle the executive and the judicial.⁴³

As yet New South Wales has not formally adopted the concept of a Parliamentary statutory officer (apart, arguably, from the Parliamentary Budget Officer)⁴⁴ and, unlike some other jurisdictions,⁴⁵ none of the legislation that establishes these bodies in NSW expressly describes them as such.⁴⁶ Nor has the concept of a fourth integrity branch been formally adopted in legislation or by judicial determination.

Nevertheless, the applicability of these two concepts (Parliamentary statutory officers and integrity branch agencies) is an important issue, and one that is worthy of further consideration.⁴⁷ The NSW Ombudsman considers that there would be benefit in pursuing a broader reform that recognises the special status of the independent oversight bodies as officers of the Parliament. Issues of funding would be one element of that.

⁴¹ Gay, *ibid.*

⁴² See Spigelman, JJ, “The Integrity Branch of Government” (2004) 78 *Australian Law Journal* 724, available at SSRN <<https://ssrn.com/abstract=1809582>>.

⁴³ See eg, Dennis Pearce:

“During my period as Commonwealth Ombudsman, I felt that I stood in a position that was part-way between the Executive and the Judiciary” (Pearce D, “Executive v Judiciary” (1991) 2 *Public Law Review* 179;

quoted in Stuhmcke A, “Australian Ombudsman: A call to take care” [2016] UTSLRS 21, at fn 65, available at <<http://www.austlii.edu.au/au/journals/UTSLRS/2016/21.html>>.

⁴⁴ It is controversial whether the Parliamentary Budget Officer properly falls within the class of Parliamentary statutory officers: see ACT Parliament, Standing Committee on Administration and Procedure, *Officers of the Parliament*, March 2012, available at <https://www.parliament.act.gov.au/_data/assets/pdf_file/0006/371913/Officers_of_the_Parliament.pdf>, at 41.

⁴⁵ Contra *Ombudsman Act 2011* (Qld) s 11(2) (“The ombudsman is an officer of the Parliament.”); *Auditor General Act 2006* (WA) s 7 (1) (The auditor general is “an independent officer of Parliament.”); *Corruption, Crime and Misconduct Act 2003* (WA) s 188(4) (“The Parliamentary Inspector is an officer of Parliament”). In Victoria there are six “Independent Officers of Parliament” including three confirmed to be so in the *Constitution Act 1975* (Vic.) s 94B (1) the Auditor-General, s 94E (1) the Ombudsman, and s 94F (1) the Electoral Commissioner. The other three are the IBAC Commissioner; the Inspector, Victorian Inspectorate; and the Parliamentary Budget Officer.

⁴⁶ But cf *Ainsworth v The Ombudsman* (1988) 17 NSWLR 276, at 283 (Enderby J) (“An Ombudsman is a creature of Parliament”); *K v NSW Ombudsman* [2000] NSWSC 771 at para [25] (“The Ombudsman is an independent officer of the New South Wales Parliament...”).

⁴⁷ Consideration of the establishment of an appropriate legislative framework for Parliamentary statutory officers has been considered by Parliamentary committees in a number of Australian jurisdictions: see eg: Parliament of Victoria, Public Accounts and Estimates Committee, *Report on a Legislative Framework for independent officers of Parliament*, 2006, available at <https://www.parliament.vic.gov.au/images/stories/committees/paec/reports/55th/67th_report_-_independent_officers.pdf>; ACT Parliament, Standing Committee on Administration and Procedure, above n 44.

However, we recognise that this inquiry may not necessarily be the appropriate forum for this to occur, given its particular terms of reference. In the absence (or perhaps in advance) of any consideration of broader constitutional reform, the question of whether an alternative and/or enhanced budget process should apply to these bodies can (and in our view should as a matter of urgency) still be answered.

In particular, the starting point should simply be the terms of the statutes that govern these bodies, and in particular their statutory mandates. In our submission, the issue to be addressed is whether an alternative or enhanced budget process is necessary or appropriate to ensure that those mandates can be fulfilled in accordance with the Parliamentary intent and community expectations.

That said, the broader conceptual debate is still worthy of note in the present context.

It highlights a broad recognition that there is something unique about this core group of institutions in terms of their functions and role in the constitutional framework. Indeed, the Ombudsman is frequently recognised as “a unique institution”⁴⁸ with “a unique role to play”.⁴⁹ In our view, a shared uniqueness of the independent oversight bodies as a class lies in their essential role maintaining and enhancing a foundational bedrock of integrity, which is necessary to assure continuing public confidence and trust in all of the other agencies, activities and services of Government.⁵⁰ We will be submitting that it is this uniqueness that warrants their funding being set by a process different to that applying to those other agencies, activities and services.

It also highlights that, when considering the proper structures and processes that should apply to these oversight bodies, attention must be given not only to what they are not (ie, offices of the Executive) but also to what they are (ie, accountable to the Parliament). It cannot be the case that the statutory guarantee of independence that is necessary for this group of entities to perform their role could effectively result in their becoming entirely ‘free-floating’ entities detached from any chains of public accountability other than judicial review on questions of legality.⁵¹ In Part 4 we return to this point, emphasising the need to ensure that, if these bodies’ funding is to be considered outside of the normal Treasury-led budget setting process, that independence (from the Executive) must be balanced by accountability (to the Parliament).

⁴⁸ *Ainsworth v The Ombudsman* (1988) 17 NSWLR 276, at 283 (Enderby J).

⁴⁹ *Commissioner of Police v The Ombudsman* (Unreported, Supreme Court of New South Wales, Sackville J, 9 September 1994), at 29.

⁵⁰ See eg, in relation to the role of the Ombudsman in safeguarding rule of law values: McMillan J, “The Ombudsman and the Rule of Law, AIAL Forum No 44, available at <<http://classic.austlii.edu.au/au/journals/AIAdminLawF/2005/1.pdf>>.

⁵¹ Requiring bodies, such as the Ombudsman, to be appropriately accountable to Parliament for their funding demands and financial performance can be seen as a partial response to the question of ‘who guards the guardians?’. That question is, of course, even more vitally raised in the context of bodies conferred with extraordinary powers and, sometimes, extraordinary secrecy: see eg, Wood, J, “Ensuring integrity agencies have integrity” AIAL Forum No. 53, available at <<http://classic.austlii.edu.au/au/journals/AIAdminLawF/2007/10.pdf>>; Joint Standing Committee on the Anti-Corruption Commission, National Conference of Oversight Committee of Anti-Corruption/Crime Bodies 2003, Report No. 7, available at <[https://parliament.wa.gov.au/Parliament/commit.nsf/\(Report+Lookup+by+Com+ID\)/B1C5509E6E0BF05648257831003E95CF/\\$file/NationalConferenceParliamentaryOversightCommittees03.pdf](https://parliament.wa.gov.au/Parliament/commit.nsf/(Report+Lookup+by+Com+ID)/B1C5509E6E0BF05648257831003E95CF/$file/NationalConferenceParliamentaryOversightCommittees03.pdf)>.

1.3 Key features of the independent oversight bodies

While each of the independent oversight bodies has developed differently over time (and vary in multiple respects from similar bodies in other jurisdictions) there are certain core elements that are shared by all. Central among these are:

1. Each is established by a separate piece of legislation that is principally devoted to that purpose and that guarantees independence from the Executive government
2. There is Parliamentary involvement in the appointment of its senior statutory officers, their appointments are for fixed term(s), and there is Parliamentary control over any early dismissal
3. Each has been created primarily to provide external scrutiny of, or a check on, the use of public power and/or public funds
4. Each has coercive powers (in most cases Royal Commission-like powers) to investigate certain action or inaction by Government
5. Each can report on matters directly to Parliament and there is a Joint Parliamentary Committee that is responsible for oversight of its performance.⁵²

Some of the independent oversight bodies exhibit some of the above features to a greater or lesser degree. Whether other bodies and officers might qualify as meeting these features is not clear-cut.⁵³

Generally, however, what connects those that do is that they were created to ensure accountability of Executive government and/or to ameliorate the perceived shortcomings of more traditional responses to alleged injustices in the use of, or abuse of, Executive power.

1.4 The importance of a transparently separate budget process

The NSW Ombudsman submits that, to the five features identified above, consideration should be given to adding a sixth as follows:

6. The budget and funding of each is set by Parliament following a Parliamentary Committee process separate from the usual Cabinet and Treasury process that applies to Departments and other Government agencies.

There are essentially two reasons for this suggestion: independence and assurance of adequate funding.

⁵² cf Gay, above n 40; See also Harris M and Wilson D (ed), *McGee Parliamentary Practice in New Zealand*, Oratia Books 4th ed., 2017, at 100, available at <<https://www.parliament.nz/media/4113/parliamentary-practice-in-nz-final-text.pdf>>; Parliament of Victoria, Public Accounts and Estimates Committee, above n 47; ACT Parliament, Standing Committee on Administration and Procedure, above n 44.

⁵³ Based on the criteria above, officers that oversight core Parliamentary institutions should themselves be considered core Parliamentary institutions. It is unclear why, for example, the Inspectors of the LECC and the ICAC would not be included in any alternative or enhanced budget process recommended by the PAC.

1.5 The budget process should recognise and protect independence (and the appearance of independence)

Independence (from Executive Government) – and the unequivocal public appearance of such independence - is essential to the effective functioning of the Ombudsman and the other oversight bodies. As one commentator has put it:

“Impartiality is fundamental to the concept of an Ombudsman; independence is the institutional feature which underpins it...”

Independence is not an end in itself. Its purpose is to secure impartiality in such a way as to re-assure those who might wish to use the services of the Ombudsman office that they will receive a genuinely fair assessment of their case. It applies not just to appointment and dismissal but also to three other aspects of the way in which the Ombudsman’s office is set up: finance; staffing; and background [of the person appointed as Ombudsman]...”⁵⁴

The manner in which an independent oversight body’s budget is determined and funding is provided is a key indicator of the true independence (or otherwise) of that body from the Executive. If the Executive controls this process there can at best be only conditional independence.⁵⁵

The threat to independence (and to the perception of independence) posed by Executive control over the budget process is further exacerbated in circumstances where that process occurs in an environment of limited public transparency.⁵⁶

1.6 The budget process should assure appropriate funding to enable the proper performance of statutory mandates

The independent oversight offices have those functions – and only those functions – that are conferred on them by Parliament through statute. A corollary of the conferral of such statutory functions is that the bearer of the functions must be provided with the budget and resources necessary to fulfil them.

As one Canadian academic has put it:

“[T]he argument that governments must control total spending and set budgetary priorities is certainly valid for regular departments. But it is less persuasive for ‘watchdog’ parliamentary agencies, which are established to review executive performance. These agencies exist to assure the public that they are obtaining value for money and various forms of fairness in their dealings with government. Independent parliamentary review of executive performance should not be treated by the executive as an optional activity to be provided only after other budgetary priorities are met.”⁵⁷

A process of budget setting for independent oversight bodies that involves directly trading their funding requirements against all of the other funding options available to Government for its manifold activities fails to recognise that:

⁵⁴ Giddings, above n 3 at 94.

⁵⁵ A point made by the ACT Parliament, Standing Committee on Administration and Procedure, above n 44, at 53.

⁵⁶ See section 2.4 below.

⁵⁷ Thomas, P. ‘The past, present and future of Officers of Parliament’, Canadian Public Administration, Vol 46, No. 3 (Fall/Autumn 2003), p 292, available at <<https://www.thefreelibrary.com/The+past,+present+and+future+of+officers+of+Parliament.-a0111935852>>.

- the functions of these bodies comprise an essential institutional infrastructure that is necessary to assure that any of those other activities can be pursued with public trust and legitimacy, and
- the mandates of the independent oversight bodies are immutable (at least in the absence of long term legislative amendment); they are distinct from and transcend whatever happens to be the political mandate, objectives and priorities of the Government of the day.

This is not to say that the statutory functions of a particular oversight body will necessarily entail an obviously and objectively *right* funding quantum for that body in any given budget period.⁵⁸ But it is to say that providing an appropriate level of funding should not be determined as part a process that treats that level of funding as *optional* or subject to prioritisation against internal Government-of-the-day spending priorities.

⁵⁸ That said, there will be a minimum quantum of funding below which there must be serious doubt as to whether the body can legitimately be said to be properly performing those functions at all. There may be uncertainty and indeterminacy even as to this minimum funding level. The NSW Ombudsman considers that it must be close to that level, if it is not already below it.

Part 2: Weaknesses of the current budget process

In this part we outline some of the weaknesses that we perceive with the current budget process as it applies to the NSW Ombudsman's Office. We understand that essentially identical processes apply in respect of the other independent oversight bodies.⁵⁹ Accordingly, where we refer to the Ombudsman below, our comments can generally be taken to extend to those other bodies.

2.1 A preliminary comment about quantum of funding

The inquiry's terms of reference explicitly direct the PAC to consider the "budget process for determining the quantum of funding" for the relevant bodies [emphasis added]. Accordingly, our comments in this submission are primarily directed toward the process by which the Ombudsman's funding quantum is set, rather than on the quantum of that funding.

It is no coincidence, however, that this inquiry is taking place at a time when serious questions are being raised about the adequacy (or otherwise) of funding provided to independent oversight bodies.⁶⁰

Although the inquiry's focus is on process, it is not possible to avoid these questions entirely. The existence of inadequate funding, particularly where that shortfall is chronic and/or worsening, clearly points to a failure in the process through which the quantum of funding has been set. Accordingly, while this submission seeks to focus on 'the process question', we cannot avoid entirely 'the quantum question'.

Indeed, it is our submission that there are a number of weaknesses in the current budget process (identified below) that contribute to a structural bias toward a below-optimal quantum of funding for the independent oversight agencies. Primary among these is the fact that the budgets for these bodies are set, largely 'behind closed doors', by a Government which has its own priorities which are effectively in competition for a finite pool of funding.

Underfunding means that a body is unable to perform its mandate in accordance with the legislative terms, Parliamentary intent and community expectations. Underfunding also risks contributing to the very problems that these bodies exist to address – namely a lack

⁵⁹ However, we understand that a significant portion of the Audit Office's funding is generated on a fee for service basis and that it is therefore less dependent on budget funding than the other independent oversight bodies.

⁶⁰ See eg., The Guardian Online, "ICAC head says funding cuts will have immediate and serious effect", 21 October 2019, available at <<https://www.theguardian.com/australia-news/2019/oct/21/icac-head-says-funding-cuts-will-have-immediate-and-serious-effect>>; Sydney Morning Herald Online, 'Anti-Corruption chiefs warn of political interference, call for independent funding,' 1 November 2019, available at <<https://www.smh.com.au/national/anti-corruption-chiefs-warn-of-political-interference-call-for-independent-funding-20191101-p536i1.html>>; The Guardian Online "NSW police watchdog investigated just 2% of 'firehose' complaints", 3 November 2019, available at <https://www.theguardian.com/australia-news/2019/nov/03/nsw-police-watchdog-fully-investigated-just-2-of-firehose-of-complaints>;

of public trust and confidence in the integrity, capability and fairness of public institutions.

If an Ombudsman, by reason of unreasonably inadequate resources, cannot investigate matters that it clearly should, if it must turn away complainants at the first step, and if it operates under antiquated systems and policies that do not instil confidence in its own compliance with record-keeping, financial management, security, privacy, and other requirements, then the Ombudsman itself – far from instilling confidence and trust in an effective public sector – may risk becoming, in the eyes of the public that it serves, evidence of a public sector that is ineffectual, or worse.

As a former NZ Ombudsman has put it:

“An effective Ombudsman’s office requires adequate funding in order to fulfil its legislative mandate...

An under-resourced office is unable to carry out [its] mandate effectively. It risks becoming part of a problem – namely an unsatisfactory interaction between a citizen and the agencies of government – rather than a means by which that relationship can be improved and injustice avoided when disputes or misunderstandings arise.”⁶¹

2.2 The appearance that independent oversight bodies are a part of the Government

Currently, the annual appropriation of funding to the Premier in respect of each of the independent oversight bodies (and to other Ministers in respect of other ‘Special Offices’⁶²) is presented as discrete line items in a separate Part of the Appropriation Bill.⁶³ However, unlike the appropriation for the purpose of funding the Parliamentary Departments (which is made to the legislature rather than to a Minister),⁶⁴ these appropriations appear in the same Bill as the appropriations for Government departments and agencies generally.

While the separate presentation of the appropriations in respect of the Special Officers in the Appropriation Bill is important as a symbolic recognition of their different status, it is inadequate to avoid entirely the likely perception that these bodies are not fully independent of Government.

In particular, the appropriations are contained in the same statute as those of the ordinary organs of Government and, more importantly, the amount of the appropriations is presented to Parliament as a *fait accompli*, having been determined through the same ‘behind the scenes’ Cabinet process as other Government departments and agencies. This risks feeding a perception that these bodies are really *part of* the machinery of Executive government, rather than occupying their unique and separate roles (which, in the case of the Ombudsman, includes the role of enhancing the political autonomy of citizens to dispute unlawful or otherwise improper decision-making *by the* machinery of Executive government).

⁶¹ Sir Brian Elwood, *Report on Leaving Office*, 2000-03, Appendix to the Journals of the House of Representatives of New Zealand, at 3.4.

⁶² The other Special Offices are: the Judicial Commission, Office of the DPP, Office of Children’s Guardian, Independent Pricing and Regulatory Tribunal, and the Public Service Commission.

⁶³ See eg *Appropriation Act 2019*.

⁶⁴ See eg *Appropriation (Parliament) Act 2019*.

That the Ombudsman (and the other independent oversight bodies) are portrayed publicly as being a part of a Government ‘cluster’ that is headed by the Department of Premier and Cabinet (**DPC**) further risks a perception of their being sub-ordinate to DPC.⁶⁵

As Professor Stuhmcke has noted:

*“Ombudsmen investigate a split executive – a political and elected government and an un-elected and ‘ongoing’ civil administration – the latter being relatively unaccountable to the people. It is here that the ombudsman renders the unaccountable accountable. For this to work citizens must share belief in the independence of the Ombudsman. Citizens must trust ombudsmen. They must do so as investigations are usually carried out in the absence of the public and **the credibility of ombudsmen therefore is related to an ability to be perceived as separate from the state.**”* [emphasis added]⁶⁶

2.3 The dependency of oversight bodies on Government support

As noted above, independence – and the appearance of independence – is essential to the functioning of the Ombudsman and the other independent oversight bodies:

*“The independence of an Ombudsman allows a powerless individual to question a powerful government on an equal footing. Without independence, or the perception of independence, this ethical or therapeutic element of an Ombudsman’s role is diminished.”*⁶⁷

A budget process which makes an independent oversight agency dependent on Executive agencies and Ministers to set its funding inherently qualifies that independence.

There are two potentially perverse outcomes of this dependency, neither of which is desirable.

The first is the risk that an independent oversight agency will be unduly mindful of its current and future financial dependency on Government when exercising its functions. This may, for example, create an impulse toward a more cautious approach when taking public action that could otherwise be seen as critical of, or to cause embarrassment to, Government. While it is difficult to point to any direct evidence of this happening, even the *theoretical* prospect that an oversight body might have an incentive to ‘go soft’ in order to ensure it can fight another day is a threat to the *perception* of a fully independent, and therefore impartial, watchdog.⁶⁸

⁶⁵ Government publications reinforce the perception that clusters are inherently part of, and responsible to, the Executive Government. For example:

*“The Premier and Cabinet **cluster** works for the people of New South Wales **by supporting the Premier and the Cabinet to deliver the Government’s objectives.** It brings the voice of Aboriginal people into policy making, develops arts and culture, protects and preserves the State’s heritage, coordinates policy and services, and facilitates stewardship of the public service.”* [emphasis added]

(text appearing at <<https://www.budget.nsw.gov.au/outcome-budgeting>>.)

⁶⁶ Stuhmcke, above n 43.

⁶⁷ Ibid.

⁶⁸ See eg Thomas, above n 57:

“It is sometimes argued that Executive control over budget of the core Parliamentary institutions could provide a means for the Executive to encroach on the independence of those institutions, either by imposing direct or indirect pressure or by weakening the resolve of those institutions to act in a manner that would see them fall ‘out of favour’ with Government.”

The risk of such a perception may be exacerbated where the body is also working within severe resource constraints.⁶⁹ Complainants to the Ombudsman who are advised that their complaints will not be investigated because of limited resources and competing priorities may already be apt to draw an inference that the Ombudsman is not just unable to investigate but rather unwilling to do so.

The other risk goes somewhat in the opposite direction; it is the potential that an independent oversight body will perceive a need to build a countervailing base of public and political support to enable it to withstand any possible 'funding blow-back' from Government – for example by seeking to make itself so publicly popular that no Government may dare risk refusing a funding request from the body without widespread criticism.⁷⁰

In the Ombudsman's submission, while the first of these risks is clearly the greater threat to the public interest, the second is also undesirable.

Both "independence and reputation are crucial currency for ombudsmen".⁷¹ It is important, for example, that the role of the Ombudsman be publicly known, and be known to be effective, in order that citizens (and especially vulnerable citizens) will take up its services, make complaints and thereby contribute to broader systemic improvement. However, promotion of the office and its work should not tip over into self-advocacy or self-aggrandisement. This is particularly so when the effectiveness of an Ombudsman in driving meaningful improvements to public institutions depends to a large degree on the extent to which those institutions recognise that the Ombudsman is "trying to assist the public sector to do a better job" and not just "to criticise with the benefit of hindsight", "to oppose government for the sake of it"⁷² or even to build its own public profile and support.

2.4 A lack of transparency

The current budget process lacks transparency for the oversight body itself, for Parliament, and for the public generally.

⁶⁹ A view may be formed that a watchdog that is poorly fed will still be circumspect (and perhaps even more so) before biting the hand that feeds it.

⁷⁰ For an independent oversight body to actually manage to achieve a state of 'untouchability' through popular support could itself lead to adverse consequences. In particular, while oversight bodies must be given the funding they need to perform their statutory functions appropriately, funding claims by those bodies *should* be subject to appropriate scrutiny. It is undesirable if those making funding decisions (whether that be the Executive or Parliament) feel held to ransom, with no option but to give a body whatever it demands. There may be circumstances where it is right that a particular request for funding should be rejected or moderated if, for example, it is manifestly unreasonable or if the body only requires additional funding because of profligacy or gross inefficiency.

See Part 4 below, on the importance of designing a budget process that still ensures that oversight bodies are held to account and that avoids the risk of 'blank cheques'.

⁷¹ Stuhmcke, above n 43, at 44.

⁷² Wheeler, C "Review of Administrative Conduct and Decisions in NSW since 1974 – An ad hoc and incremental approach to radical change," AIAL Forum No. 71, at 42, available at <<http://classic.austlii.edu.au/au/journals/AIAdminLawF/2012/23.html>> (arguing that this recognition by Government has been one of the important signs of a positive and maturing relationship between the Ombudsman and the Executive government)

If an oversight body puts forward a funding proposal and it is not approved, it will not necessarily be clear even to that body why the proposal was rejected, by whom and on what basis.

For example, if a funding bid that is made during the annual budget preparation process does not make it into the Government's final budget, this could conceivably be because it failed to pass any number of hurdles – it may have been opposed by DPC;⁷³ opposed by Treasury; rejected by the Treasurer or another Minister or rejected at the final hurdle by the relevant Cabinet Committee.

Even if the rejection is by the Treasurer or another Minister, the Ombudsman will have no way of necessarily knowing what information had been put before them when they made that decision. Once discussions with DPC and Treasury during the initial stages of the budget process are complete, the process becomes, from the Ombudsman's perspective, a 'black box': the shutters come up, there is a lengthy period of silence, and eventually the Ombudsman is told what his or her budget will be.

However and by whomever the funding proposal is rejected, there will be no visibility of that rejection by, and certainly no reasons for the rejection given to, Parliament or the relevant Parliamentary Committee. Indeed, in the ordinary course, the Parliament and the public will be oblivious to any such funding request even having been made.

The rejection of a funding proposal will only come to broader notice if the relevant oversight body itself draws attention to it. Obviously this is not something an oversight body would do lightly:

- Being seen to 'go around' the budget process by complaining publicly about funding decisions will potentially cause embarrassment or political difficulties for government officials or Ministers, and may risk jeopardising their support for any future funding requests.
- There is a danger that the oversight body may be seen by Government as not having complied with the conventions around Cabinet confidentiality.⁷⁴ This may make Government even less willing to be transparent with the body about budget decision-making, for example, by sharing internal advice prepared for the consideration of Cabinet's Expenditure Review Committee.
- Any budget setting process will obviously require the independent oversight bodies to provide information and advice to relevant decision-makers about their functions, demand and associated funding needs. However, if that advice is disregarded and the body is seen to have turned to advocacy (especially public advocacy) there may be a risk of reputational harm to the body itself. Independent statutory offices are appointed to perform specific statutory functions in an

⁷³ The role played by DPC in the budget process is not entirely clear: see section 2.7 below.

⁷⁴ Advice on Cabinet confidentiality is set out in Premier's Memorandum 2006-08, "Maintaining confidentiality of Cabinet documents and other Cabinet conventions", available at <<https://arp.nsw.gov.au/m2006-08-maintaining-confidentiality-cabinet-documents-and-other-cabinet-conventions/>>. That Premier's Memorandum was issued in response to a recommendation of the ICAC following the alleged leaking of a draft Cabinet submission: Investigation into Sydney Harbour Foreshore Authority and Roads and Traffic Authority - alleged leaking of a draft Cabinet minute (Operation Derwent), see <<https://www.icac.nsw.gov.au/investigations/past-investigations/pre-2009#2006>>.

impartial manner that is 'above politics', and it may appear unseemly if they are embroiled in a public stoush over their own funding.

That said, a body that is statute-bound (by Parliament) to perform certain functions but that is (by decisions of the Executive) denied the funds reasonably necessary to perform those functions, may consider itself to have an overriding public obligation to raise that disconnect with Parliament.

2.5 The lack of review process

Related to the point above, if a funding proposal is rejected (at whatever level within the Executive), there is no built-in mechanism by which the relevant body may seek any review of that decision, or otherwise insist that it proceed to the next level of decision-maker – whether that be the Treasurer, Cabinet Committee or Parliament.

2.6 Limited attention given to the funding needs of the independent oversight bodies

The attention and resourcing that is applied by Government, and Treasury in particular, to engaging with agencies in respect of their funding needs tends, unsurprisingly, to be generally commensurate with the size of that agency relative to the size of the overall State budget. Simply put, larger agencies receive greater attention and from more senior levels of the bureaucracy. (For example, while all agencies have an assigned liaison officer in Treasury, for the Ombudsman this officer is a clerk grade 7/8, which is three grades below the first band of executives). That is no criticism of Treasury (or of the officer assigned to such role), and is understandable given its role and purpose.

However, it does pose a problem for smaller agencies, and especially those that are small in financial terms but arguably loom larger in terms of their role in the constitutional framework. The Legislative Assembly and Legislative Council are perhaps the best examples of this disconnect – from a financial perspective they are relatively insignificant in the context of the entire State budget, but their importance clearly outweighs their financial scale by many orders of magnitude.

The NSW budget appropriation for 2019-2020 was \$82,530,500,000. The total appropriation for the Ombudsman's Office was \$29,045,000.⁷⁵ This represents about 0.035% of the total appropriation for the 2019-2020 budget. Even the total for all of the 'Special Offices' combined was only \$432,911,000 (or about half of one percent of the total State budget).

2.7 A lack of clarity as to the role of DPC, and a dependency on it for supplementation

The role of DPC in the budget process for independent oversight bodies is not entirely clear, and in practice has changed over time.

Publicly, the Government describes the Ombudsman and other independent oversight bodies as agencies within a Premier and Cabinet cluster headed by DPC. However, the concept of a 'cluster' appears to have no legislative backing, at least in so far as it is said to include independent statutory offices.

⁷⁵ This figure includes the funding for ERCP functions, which are expected to shortly transfer to the Office of the Children's Guardian: see n 5 above.

Under the *Government Sector Employment Act 2013 (GSE Act)*, agencies such as the Ombudsman’s Office are identified as “separate agencies”, and the Ombudsman is the employer of all of his or her executive and non-executive staff. The Secretary of DPC is given no particular powers under that Act in respect of those agencies. Likewise, under the *Government Sector Finance Act 2018 (GSF Act)*, agencies such as the Ombudsman’s Office are identified as “separate GSF agencies”. Again, the Secretary of DPC is given no particular powers in respect of those agencies.

The establishment of public sector agencies as ‘clusters’ commenced in New South Wales in 2009, when existing departments were consolidated into 13 ‘principal departments’. The concept of clusters was given further impetus following a Commission of Audit that commenced in 2011, and especially with the subsequent enactment of the GSE Act in 2013.

Although the independent oversight bodies⁷⁶ have been represented in Government publications as part of the DPC cluster, there had previously been a shared recognition of their separateness. This was made clear in various communications at the time intended to clarify the ongoing independence of these “other bodies” (as they were then described) from DPC. For example, correspondence from DPC to the oversight bodies at the time provided that:

“The DPC, in its role of a Super Department will not be formulating all encompassing reports, plans or submissions required by other NSW Government agencies that would portray the Other Bodies as part of its operations.”⁷⁷

Later, following the enactment of the GSE Act, DPC published a “Public Sector Governance Framework”, which appears to remain active.⁷⁸ It recognises that:

“Some entities are not subject to any Ministerial direction and control and the alternative governance mechanism takes the form of a Joint Parliamentary Committee which provides functional oversight, for example Accountability Institutions such as the Ombudsman and Independent Commission Against Corruption.”⁷⁹

The Framework provides that for these “Accountability Institutions”:⁸⁰

“5.5 Accountability Institutions

Accountability Institutions monitor certain aspects of Government administration and to [sic] assist Parliament to hold the Executive branch of Government accountable for its actions.

Accountability Institution	
Ministerial direction and control	Accountability Institutions are independent of the Executive branch of Government and have a statutory obligation to report directly to Parliament as required. They are not subject to Ministerial direction or control. Joint Parliamentary Committees are established to monitor the functions of Accountability Institutions.

⁷⁶ At that time this included the Police Integrity Commission, the LECC not yet having been established.

⁷⁷ Correspondence from the Acting Director General, DPC to the Ombudsman, *Optional Protocol for the Administrative Requirements between the Department of Premier and Cabinet (DPC) and Other Bodies in the DPC cluster*, received 7 June 2010.

⁷⁸ DPC, *NSW Public Sector Governance Framework*, February 2013, available at <<https://www.dpc.nsw.gov.au/assets/dpc-nsw-gov-au/files/Programs-and-Services/Governance/736f5dc2ba/NSW-Public-Sector-Governance-Framework-2013.pdf>>.

⁷⁹ *Ibid*, at 8.

⁸⁰ *Ibid*, at 26.

	Appointments to these positions or entities may be vetoed by the Joint Parliamentary Committee for that entity.
Legal form	Accountability Institutions are established under legislation.
Employment of staff	Accountability Institutions should directly employ their own staff. Staff are generally employed under the PSEMA but in some instances their conditions of employment may be determined by the Accountability Institution in so far as they are not fixed by or under another Act or law.
Financial and asset management controls	Funding is generally appropriated directly to the Minister for the Accountability Institution. Accountability Institutions do not generally receive grant funding from the Principal Department.
Other characteristics	An Accountability Institution may be an individual statutory officer or a body corporate comprised of one or more members. It is supported by an administrative office.

However, in terms of financial matters, DPC appears to assert a significant leadership or at least coordination role with respect to all bodies in the DPC cluster, including the independent oversight bodies.

In respect of the annual budget process, there appears to be no legislative role at all for DPC in terms of setting budgets for the independent oversight bodies, which instead are meant to communicate directly with Treasury (through its budget system, PRIME). In practice however, it seems evident to us that DPC is closely involved in scrutinising funding bids for all bodies within its cluster, such that DPC support is always necessary (but not always sufficient) for any funding request.⁸¹

The enhanced role of DPC appears to be driven, at least in part, by an expectation from Treasury that principal departments will take responsibility for the management of overall cluster budgets. For example, a typical response from Treasury to a call for enhanced funding is that, unless the request is at least \$10 million, it will not even be entertained, and Treasury instead expects that the matter should be dealt with at cluster level.

The role/responsibility of DPC for the budgets of the independent oversight bodies has become even more important in recent years as a result of the increasing need for those bodies to seek mid-year supplementation of funding. A consequence of having such a small budget, and one that is already stretched, is that any unforeseen circumstance that gives rise to a need for additional resources occurring after the annual budget has been set will result in a need for supplementary funding.

It is clear that the policy and practice of Treasury is not to support the setting of budgets that build in 'contingencies', except perhaps at the cluster (that is, principal department) level. This may be appropriate for Departments and other very large agencies. However,

⁸¹ Of course, this might still be the case even in the absence of clusters, given DPC's role as adviser to the Premier and to the Cabinet, including as Secretariat to the Cabinet Expenditure Review Committee.

small agencies, and especially agencies with non-discretionary statutory functions, lack the flexibility to meet demands internally.

This means that supplementary funding will be required even for a relatively small unforeseen resource demand (the alternative is for the body, if it has the discretion to do so, to simply decline to meet that new demand or to withdraw services in other areas where it does have some discretion – a problem discussed further below).

In practice, this means that the only avenue open to agencies like the Ombudsman to seek additional funding is by a request at ‘cluster level’ to the Secretary of DPC. It appears that this may be an intentional structural element of the Government’s current approach to funding the independent oversight bodies (and indeed all budget-funded agencies).

There are two major problems with this approach:

- (a) The first is that the only source of funding that DPC has to provide the supplementation will be its own budget or, theoretically, by taking funding from other agencies within the Premier and Cabinet cluster.

Either way, the Secretary of DPC is faced with a zero-sum proposition. Even if he fully supports the funding request in principle, the Secretary knows that to agree to it entails giving up funding that would otherwise be available for his or her own Department’s plans. This places the Secretary of DPC in an invidious and inherently conflicted position, and the process is one that works for neither the Ombudsman nor the Secretary. Typically, the Secretary is left to weigh up, on the one hand, the risk of an unhappy statutory officer (including the risk of that statutory officer’s unhappiness, if manifested publicly, becoming an issue for his political master) against the risks to his or her own Department’s ability to deliver the Government’s priorities within a finite budget.

- (b) The second, and potentially more serious, problem is that this process inherently confers on the Secretary of DPC a *de facto* discretion to approve or veto the exercise of particular functions. This constitutes a direct threat to the independent and impartial exercise of those functions. For example, if funding is sought because the oversight body has identified the need for a new and major investigation, the ability of the Secretary of DPC to provide or refuse funding constitutes, in effect, an ability to approve or veto the undertaking of that investigation.

Even if the Secretary provides the funding, the perception that his or her approval was needed at all undermines the perception of independent and impartial oversight.

2.8 The masking of budget problems because of the uneven distribution of funding shortfalls

As a creature of statute, the activities of the Ombudsman, as with the other independent oversight bodies, can broadly be grouped into three categories:

<p><i>Performing the function is non-discretionary, and the way the function is performed is non-discretionary (Category 1)</i></p>	<p>Category 1 includes the intake and initial assessment/triaging of complaints.</p> <p>Under the <i>Ombudsman Act 1974</i>, any person has a right to complaint to the Ombudsman about the conduct of a public authority (subject only</p>
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	<p>to certain jurisdictional exclusions set out in Schedule 1 of the Act).⁸² Similarly, the <i>Community Services (Complaints, Reviews and Monitoring) Act 1993</i> confers the right on interested persons to complain to the Ombudsman about community service providers.⁸³ Other legislation requires certain matters to be notified to the Ombudsman.⁸⁴ Receiving a complaint or notification and, at the very least, undertaking some form of assessment of it is non-discretionary.</p> <p>Category 1 also includes certain prescribed and mandatory auditing and reporting obligations.</p> <p>For example, under the <i>Public Interest Disclosures Act 1994</i>, the Ombudsman is required to prepare a monitoring report at least every 12 months,⁸⁵ an audit report at least every 12 months,⁸⁶ an annual report on its activities,⁸⁷ and an annual report on the activities of the PID Steering Committee.⁸⁸ As convenor of the Child Death Review Team, the Ombudsman must prepare an annual report on its operations,⁸⁹ a biennial child death review report,⁹⁰ and reports on child death research⁹¹ (or, failing that, it must report on why no such research reports have been prepared).⁹²</p>
<p><i>Performing the function is non-discretionary, but there may be some discretion in terms of the number, extent or quality of activities undertaken in performing the function (Category 2)</i></p>	<p>This category includes functions such as Part 3B of the <i>Ombudsman Act 1974</i>, which provides that the Ombudsman “is to” monitor and assess prescribed Aboriginal programs.⁹³ This requires at least sufficient scrutiny of those programs to enable the Ombudsman to form and express views that qualify as a genuine “assessment”.</p>
<p><i>There is a statutory mandate to perform the function, but there is significant discretion in terms of the number, extent or quality of activities undertaken in performing the function (Category 3).</i></p>	<p>Category 3 comprises the bulk of the Ombudsman’s statutory functions, and includes the Ombudsman’s core functions of handling and resolving complaints (beyond mere intake and triage), making enquiries, investigating complaints, investigating systemic issues (including on its own motion), monitoring various systems and programs, auditing certain activities, reporting and undertaking sector capacity building activities.</p> <p>As already noted, it is not correct to say that these activities are wholly ‘discretionary’. That statutory functions have been conferred on the Ombudsman means that the functions must be discharged to some extent.</p>

⁸² s 12 *Ombudsman Act 1974*.

⁸³ ss 22 and 23 *Community Services (Complaints, Reviews and Monitoring) Act 1993*.

⁸⁴ Eg. r 10 Children (Detention Centres) Regulation 2015 (mandatory notification of the segregation of a detainee for more than 24 hours); s 25R *Ombudsman Act 1974* (mandatory reporting of reportable allegations or convictions regarding persons with a disability); s 37 *Community Services (Complaints, Reviews and Monitoring) Act 1993* (mandatory notification of reviewable child deaths).

⁸⁵ s 6B(2) *Public Interest Disclosures Act 1994*.

⁸⁶ s 6B(2) *Public Interest Disclosures Act 1994*.

⁸⁷ s 6B(3) *Public Interest Disclosures Act 1994*.

⁸⁸ s 6A(6) *Public Interest Disclosures Act 1994*.

⁸⁹ s 34F *Community Services (Complaints, Reviews and Monitoring) Act 1993*.

⁹⁰ s 34G *Community Services (Complaints, Reviews and Monitoring) Act 1993*.

⁹¹ s 34H *Community Services (Complaints, Reviews and Monitoring) Act 1993*.

⁹² s 34F(2)(d) *Community Services (Complaints, Reviews and Monitoring) Act 1993*.

⁹³ s 25L *Ombudsman Act 1974*.

	However, the decision to pursue a particular investigation (within the meaning of section 26 of the <i>Ombudsman Act</i>), whether on complaint or on own-motion, is highly discretionary. The small number of formal investigations undertaken bears no correlation to the extent of suspected section 26 conduct that has been brought to the Ombudsman's attention, but rather reflects the resources that have been available to the Ombudsman. ⁹⁴
<i>Those activities which are not explicitly mandated by statute but which are essential to the long-term sustainability or effectiveness of the Ombudsman's other activities (Category 4).</i>	Category 4 comprises a range of activities that the Ombudsman needs to do in order to ensure its long term effectiveness and sustainability. Category 4 includes most of the office's internal-facing activities such as the training of staff, updating, maintaining and supporting financial, ICT and human resources systems, and supporting legal and compliance activities (for example, with respect to privacy and cyber security requirements). It also includes the development and continuous review of the office's governance and risk policies, systems and controls.

The distinction between the above categories is not neat, and might better be conceived of as a spectrum. For example, even though the receipt and initial assessment of a complaint is non-discretionary, there may be some discretion in terms of the time given to, and quality of, that assessment. Some activities, such as those which are aimed at increasing the accessibility of the Ombudsman's services (eg., community engagement and outreach, website development and communications, and language translation), also cut across a number of categories.

However, the point of identifying these categories in this submission is simply to demonstrate that, under current budget processes, there will be an uneven impact of resource pressures on the office. In particular, budget constraints will necessarily result primarily in the squeezing of categories 3 and 4.

This is concerning for a number of reasons:

- The traditional Ombudsman functions that are, and should remain, the most central to its role (such as dealing with and investigating complaints) tend to fall within category 3, and therefore be diminished. As the former NSW Ombudsman said in a recent Annual Report:

"[T]raditional core functions of complaint handling and investigation are not earmarked [by Government] as requisite functions. They fall within the discretionary budget of the office. Clearly, they are vital functions in the work of a parliamentary Ombudsman and must be discharged effectively".⁹⁵

⁹⁴ It is worth observing that, even aside from resource considerations, the NSW Ombudsman generally seeks to resolve complaints without investigation where possible and appropriate. That there are many complaints received but significantly fewer investigations undertaken is neither surprising nor undesirable, given the other ways in which the Ombudsman is able to resolve complaints without resorting to a formal investigation. In most cases, informal resolution is not only more efficient but also more effective, both in terms of achieving fast and just outcomes for complainants as well as for driving appropriate corrective action and systemic change within agencies and service providers. That said, it is certainly the case that there are serious and systemic concerns that should and would have been subject to an investigation, but for the Ombudsman's limited resources.

⁹⁵ NSW Ombudsman, *NSW Ombudsman 2014-15 Annual Report*, 26 October 2015, at 3, available at <https://www.ombo.nsw.gov.au/__data/assets/pdf_file/0006/28275/NSWOmbudsman_Annual-Report_2014-2015.pdf>.

- Engagement and outreach activities, particularly for vulnerable communities, are not legislatively prescribed and so also tend to be seen as discretionary in the face of funding pressures. The inability to provide appropriate language translation and accessible communications (such as Easy English and disability-friendly web-sites), as well as to undertake community visits and other forms of direct engagement, undermines the democratic promise of an equitable and accessible Ombudsman service, especially for those who need it most.
- The long-term underinvestment in Category 4 activities creates significant risks that progressively worsen over time and may have the potential to threaten the long term effectiveness and even viability of the office to perform its functions effectively and in compliance with the law.

A significant issue is that consequences of underfunding, such as those listed above, may not be apparent to the Treasury and Government when it sets the Ombudsman’s budget. Even if they are raised and recognised, there may be a tendency to give them insufficient consideration as they are not seen as problems *for the Government*. The consequence is that these areas can continue to be squeezed in a way that masks a problem of chronic underfunding.

2.9 The competition for funding against the Government’s own priorities

This brings us to what appears to be the most problematic aspect of having the Government control the budget setting for the independent oversight agencies: the Government of the day and each of its Ministers will have their own priorities for funding.

The New Zealand Parliament cites this as a primary reason why there needs to be a separate funding process for its independent oversight bodies:

“Officers of Parliament are not part of the Government, so they don’t have Ministers who can advocate for them to receive enough public funding each year.”⁹⁶

It is no criticism of DPC or Treasury to observe that their objectives, including in respect of the budget process, is to advance the priorities of the Government of the day. The NSW Treasury website contains the following, entirely uncontroversial, statement:

*“The role of NSW Treasury is to manage the state’s finances to best support the economy, ensuring NSW will always be a great place to live and work. In this work, **NSW Treasury is guided by the Premier’s Priorities and State Priorities.**”*⁹⁷ [emphasis added]

What is missing, however, is a recognition that the statutory mandates of the statutory oversight bodies are not negotiable, and transcend whatever happens to be the priorities of the Government of the day. It may be that much of the work of the Ombudsman can be shown to advance the “Premier [of the day]’s priorities”.⁹⁸ However, the value of that work, and whether or not it is funded, should not be solely contingent upon this. Free and fair elections, institutions free of corruption, and lawful, just and reasonable government

⁹⁶ New Zealand Parliament, *Fact sheet: Who are the Officers of Parliament?*, 15 August 2019, available at <<https://www.parliament.nz/en/visit-and-learn/how-parliament-works/fact-sheets/who-are-the-officers-of-parliament>>.

⁹⁷ See <<https://www.treasury.nsw.gov.au/budget-process>>

⁹⁸ For example, much of the work of the Ombudsman is aligned with, and contributes to, the Government’s priorities around “improving customer service”.

decision-making are foundational objects that Parliament has mandated as essential, irrespective of the Government's particular priorities.

2.10 A funding bias toward new initiatives over ongoing, core functions

Budget time provides an opportunity for Government to announce new initiatives that generate media and public interest, and to seek increased popular support. Inevitably, the same political mileage cannot be obtained from a Budget measure that 'merely' sustains or increases the funding provided for an existing function, irrespective of how important and in need of funding that function may be.

This is a particular problem for Parliament and the independent oversight agencies, whose functions, as already explained, are essential and enduring and, at least in the case of the Ombudsman, are largely performed away from the public gaze.

The same attention and acclaim that are likely to accompany the announcement of the funding of a new body or program will inevitably surpass whatever media and public interest might be generated by a modest funding increase to support the already core functions of an existing body. In this context, the maintenance of funding for these bodies may come to be seen by Government as an 'inconvenience' that provides little or no benefit to them but detracts from the pool of funding that would otherwise support new initiatives.

2.11 Distorted decisions about whether new functions should go to existing bodies or to new bodies

That new initiatives tend to be more favourably treated by Treasury than core ongoing functions can distort the decision-making process around when and where new functions should be conferred.

On the one hand, there may be an incentive for existing bodies to seek new functions (in order to gain greater funding and scale), even where those functions might not be entirely appropriate for them. On the other hand, it may lead to a reluctance to confer new functions on those existing bodies when it actually would be better to do so.

As noted by Professor John McMillan:

"A perennial concern of Ombudsman offices is their meagre funding, especially as contrasted to the growth in size and functions of the government agencies the Ombudsman oversees. History indicates that Ombudsman offices do not get extra funding and support from government by bleating about their restricted funding. On the other hand, recent developments illustrate that Ombudsman offices will be given extra funding by government if they can demonstrate their ability and effectiveness in discharging new functions. Indeed, a strong theme in contemporary budgetary policy around Australia is that government agencies face annual efficiency dividends that can reduce their core funding, but this can be countered by acquiring a new function that attracts additional funding."⁹⁹

As Professor McMillan goes on to say, there is a risk for agencies, like the Ombudsman, if they can only effectively seek to maintain their funding by pursuing an ever expanding

⁹⁹ McMillan J "The expanding Ombudsman role: What fits? What doesn't?" (Speech, Australian Pacific Ombudsman Region Meeting, 27 March 2008), 1 available at <https://www.ombudsman.gov.au/__data/assets/pdf_file/0016/31057/27-March-2008-The-expanding-Ombudsman-role-What-fits-What-doesnt.pdf>.

growth in functions. One danger is that they may accept roles that are not appropriate and aligned with the essential principles of their mandate and model.¹⁰⁰

Perhaps the greater risk is simply that any process of expansion of functions and funding to an oversight body, while it may temporarily preserve the appearance of sustained or increased funding, may serve rather to mask a chronic and ultimately unsustainable gap in resourcing for its core functions.

On the other hand, there is also a risk that new functions that *should* be conferred on an existing oversight body will instead be invested toward the establishment of a less effective and inefficient new body.¹⁰¹ This may be because advocates for the new function recognise that existing oversight bodies are already struggling to meet the demands of their core functions with inadequate resourcing. They will be concerned that, if the new or expanded function and its associated funding are conferred on one of those existing bodies, then over time some of that funding and attention will be diverted to support the body's other existing under-resourced core functions.

In recent years, the movement of functions to and from the NSW Ombudsman has shifted dramatically. There has been a contraction rather than a growth in its functions as large parts of its jurisdiction have been transferred to other specialised bodies – for example, police oversight to the Law Enforcement Conduct Commission and (shortly) employment related child protection functions to the Office of the Children's Guardian.

Many of these changes have been supported, and in some cases recommended,¹⁰² by the Ombudsman, and have allowed the office to refocus on its traditional core functions. However, the outflow of the funding that was associated with those outgoing functions has exposed starkly the effects of a long-term process that has left the remaining core functions under-resourced.

With the recent changes (including the upcoming transfer to the Children's Guardian of child protection functions) the size of the Ombudsman Office has reduced by about half (to a staffing of around 130 employees and a budget of around \$25m). As well as exposing an underfunding of core functions, the reduction in size and scale exacerbates the 'small agency' problems identified elsewhere in this submission.

It is possible that new functions may, in the future, be assumed by the Ombudsman's Office (for example, it appears likely that the NSW Ombudsman will have a role to play as a national preventive mechanism (**NPM**) under a future NSW implementation of the Optional Protocol to the Convention Against Torture (**OPCAT**)). Even so, the Ombudsman will inevitably remain, in the galaxy of government agencies, an exceptionally small planet, and one whose core functions will not (and should not) change.

2.12 Funding that does not necessarily follow (new) functions

¹⁰⁰ Ibid, at 2; see also Stuhmcke, above n 43.

¹⁰¹ It is an interesting contrast that the number of specialised oversight bodies has been increasing at the same time as there has been a significant rationalisation of departments and agencies into fewer and larger principal departments.

¹⁰² Eg, NSW Ombudsman, *Abuse and neglect of vulnerable adults in NSW – the need for action*, 2 November 2018, at 4, available at < https://www.ombo.nsw.gov.au/__data/assets/pdf_file/0003/62139/Abuse-and-neglect-of-vulnerable-adults-in-NSW-November-2018.pdf>.

While new funding is more likely to come with a new function, under the existing budget process there is no guarantee that even new or expanded functions will come with adequate funding to support them.

Oversight bodies generally have no choice when it comes to additional functions – they are typically conferred by legislation and, once enacted, the body is legally obliged to execute the function.

Perversely, the likelihood of additional funding being provided with a new function may vary with the size of the ask – the more resources that a new function will require to perform the more likely it seems that Government will agree to provide necessary funding. Where functions come with more modest resourcing needs, the response from Government is more likely to be that the body should fund those needs ‘from within existing resources’ or should seek funding ‘from the cluster’ (ie., from DPC).

Even when Government is willing to enter into a dialogue with an oversight body about providing enhanced funding to support a new function, inevitably that dialogue takes the form of a negotiation in respect of which the oversight body is relatively poorly positioned. Having not performed the relevant function before the body may not be well placed to assess its likely cost and resourcing needs at the outset. And, if funding proves to have been inadequate at the outset, it is unlikely to have an opportunity to renegotiate funding in future (at which time the function will have instead become just part of the ordinary business of the body, and subject to efficiency dividends and the like).

2.13 The inappropriate application of “efficiency dividends”

General criticisms of the ‘blunt instrument’ of efficiency dividends are obvious and well-known, and it is not necessary to repeat all of them here.¹⁰³

However, the application of efficiency dividends to the Ombudsman (and presumably to the other independent oversight bodies) raises particular problems, including:

- (a) The efficiency dividend is applied to the NSW Ombudsman with no reference or apparent regard whatsoever to any alleged inefficiency in the Ombudsman’s operations or performance.
- (b) The Ombudsman is a small agency, and its budget is comprised almost entirely of employee-related expenses. Most of those staff are engaged in front-line complaint handling and investigation, which are roles that technology cannot replace. There is no ability to absorb efficiency dividends without cutting staff and therefore either the quantity or quality (or, more likely, both) of its services.
- (c) It appears that efficiency dividends are now being imposed and administered at cluster level. The logic appears to be that this gives Ministers and Departmental Secretaries greater flexibility to vary the impost of the dividend amongst divisions of their department and across other agencies in their cluster, presumably so that

¹⁰³ For a short outline of some of these see eg: Horne N, “The Commonwealth efficiency dividend: an overview”, Commonwealth Parliamentary Library, 2002 available at <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2012-2013/EfficiencyDividend>.

they can be imposed where there is more scope for efficiencies.¹⁰⁴ In practice, however, efficiency dividends continue to be imposed on the Ombudsman with no regard for efficiency and no explanation for why the particular quantum of cuts has been imposed. (An apparent conferral of discretion on the DPC Secretary to distribute efficiency dividends across the cluster raises again questions about independence and the appearance of independence, discussed above).

- (d) An evident purpose of the efficiency dividend process is to “allow government to redirect a portion of efficiency gains to higher priority activities”.¹⁰⁵ Even if efficiency dividends were originally conceived as a means of driving greater efficiencies, they continue to be applied as a matter of course year after year, the amount of the dividend and its application across agencies occurs with no *ex-ante* assessment of the extent of any claimed inefficiencies within each agency, and there is no *ex-post* assessment of whether efficiencies were, in fact, realised. This suggests that a redistribution of fiscal resources from existing activities to new Government initiatives is now the primary purpose of the efficiency dividend policy.

However, it appears inappropriate for the Government to use efficiency dividends in this way, syphoning funds away from oversight bodies’ statutory functions in order to increase the funding available for the Government’s own priorities.

- (e) Efficiency dividends and other savings initiatives not only have an impact in the year applied, but also a cumulative impact as additional cuts are made year after year.

In 2008, the Commonwealth Parliamentary Joint Committee of Public Accounts and Audit assessed the impact of efficiency dividends and similar savings measures on small Commonwealth agencies.¹⁰⁶ While the Committee recognised the benefits of striving for efficiencies, it was concerned about agencies with expenses of less than \$150 million, as those agencies have poorer economies of scale. The Committee found that:

“Smaller agencies face particular challenges in relation to the efficiency dividend. One issue is that smaller agencies are often established to fulfil a specific function or purpose. That limits the capacity to reprioritise or trim discretionary activities. Also, such agencies are occasionally required to absorb new functions. The cost of one additional activity may appear small, but it could represent a large proportion of a small agency’s total budget.”¹⁰⁷

The Committee also warned that as efficiency dividends begin to bite, it can lead to a reduction in services and place greater pressure on existing staff. The Committee quite rightly described this as a “false economy”. It is relevant to note that, in the

¹⁰⁴ This is the explanation given for the application of Commonwealth efficiency dividends at portfolio level: *ibid.*

¹⁰⁵ This statement is contained on the Commonwealth Finance website at <<https://www.finance.gov.au/about-us/glossary/pgpa/term-efficiency-dividend>>. We could find no reference at all to efficiency dividends in a search of the NSW Treasury website.

¹⁰⁶ Parliamentary Joint Committee of Public Accounts and Audit, Commonwealth Parliament, *The efficiency dividend and small agencies: Size does matter* (Report 413, December 2008), available at <https://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jcpaa/efficdiv/report.htm>.

¹⁰⁷ *Ibid.*, at xix.

Commonwealth's current budget, agencies with an average staffing of less than 200 have been excluded from the application of this year's efficiency dividend.¹⁰⁸

Concerns about efficiency dividends have been raised by former Ombudsmen before the Committee on the Office of the Ombudsman, Law Enforcement Conduct Commission and the Crime Commission on a number of occasions, as well as in correspondence to the Premier. The current Ombudsman has recently written to the Secretary of DPC outlining his concerns about the detrimental impact of the blanket application of additional efficiency dividends to the work of his office.

¹⁰⁸ Explanatory Note to the Cth Appropriation Bill 2019-20.

Part 3: Potential alternative budget processes

The challenges around funding core integrity bodies are not unique to NSW. A number of other jurisdictions have established, or are in the process of establishing, alternative funding models aimed at better ensuring that the independence of core integrity bodies is secure, and that funding processes are transparent.

In this part we outline the approach taken to funding the Ombudsman in New Zealand, as well as briefly touching on the similar approach that is soon to commence in Victoria for the funding of its Ombudsman.

3.1 The New Zealand approach

Section 3 of the *Ombudsmen Act 1975* (NZ) provides for the appointment of one or more Ombudsmen, as officers of the Parliament. (There are three officers of Parliament in New Zealand: the Controller and Auditor General, the Ombudsman, and the Parliamentary Commissioner for the Environment.)

Section 31 of the *Ombudsmen Act 1975* (NZ) states that:

31 Money to be appropriated by Parliament for the purposes of this Act

Except as otherwise provided in this Act, all salaries and allowances and other expenditure payable or incurred under or in the administration of this Act shall be payable out of money to be appropriated by Parliament for the purpose.

As an independent body, the Remuneration Authority determines the Ombudsman's salary and it may not be diminished during the Ombudsman's term. The Ombudsman's salary is appropriated under permanent legislative authority as part of the budget appropriations process. Ombudsman staff salaries are set by the Ombudsman and are not constrained by government policy initiatives, such as efficiency dividends or wages policy.

Part 1 of the *Public Finance Act 1989* (NZ) outlines the appropriation process to allow the Crown or an Office of Parliament to incur expenses or capital expenditure. Section 26E outlines how the appropriation process applies to Offices of Parliament:

26E Application of this Part to Offices of Parliament

- (1) *Before an appropriation in a Vote administered by an Office of Parliament may be included in an Appropriation Bill for a financial year, the chief executive of the Office concerned must prepare and submit to the House of Representatives the following information:*
 - (a) *an estimate of expenses and capital expenditure to be incurred for—*
 - (i) *each proposed appropriation; and*
 - (ii) *each proposed category of expenses or non-departmental capital expenditure within a multi-category appropriation; and*
 - (b) *the revenue of the Office (including the revenue associated with each proposed expenses appropriation and each proposed category of expenses within a multi-category appropriation).*
- (2) *Before an authorisation for a capital injection to be made to an Office of Parliament may be included in an Appropriation Bill for a financial year, the chief executive of the Office concerned must submit to the House of Representatives the amount of the proposed capital injection.*
- (3) *The House of Representatives, after considering the information provided under subsections (1) and (2), may for each Office of Parliament commend to the Governor-General, by way of an address,—*
 - (a) *the estimates referred to in subsection (1)(a); and*

- (b) *the capital injection referred to in subsection (2).*
- (4) *The House of Representatives may, in that address, request that the estimates be included as a Vote, and the capital injection be authorised, in an Appropriation Bill for that year.*
- (5) *If the Vote or authorisation is included in an Appropriation Bill for that year, this Part applies, with all necessary modifications, as if references to a department were references to an Office of Parliament.*
- (6) *An alteration to the Vote or authorisation during that year is subject to the provisions of this section.*

The House of Representatives has constituted an Officers of Parliament Committee to review and make recommendation on the budgets of the Offices of Parliament. The Speaker is the Chair of the Committee, as well as being the ‘responsible Minister’ for the appropriation to the Offices of Parliament. The Speaker is not able to direct the Ombudsman.

The funding process is explained in detail in *McGee Parliamentary Practice in New Zealand*, as follows (footnotes included below):¹⁰⁹

“Funding for Officers of Parliament

The Officers of Parliament are subject to a special process for the pre-Budget approval of appropriations for their offices. It involves a parliamentary committee determining their budgets before their Estimates are formally presented to the House.

The Officers of Parliament must submit to the House each year an estimate of expenses and capital expenditure to be incurred by their offices, together with a description of the classes of outputs to be produced, the revenue to be earned and other financial information.^[24] In the case of the Auditor-General this information is incorporated in the draft annual plan prepared for submission to the House.^[25] The information is forwarded directly to the Officers of Parliament Committee. It is the committee’s duty to recommend to the House an estimate of the expenditure of each Office of Parliament for inclusion in a vote in an Appropriation Bill.^[26] For this purpose the committee hears evidence from the officers themselves, and calls for comment from officials of the Treasury. In determining what Estimates to recommend, the committee is mindful of the criteria used by the Cabinet in considering departmental budget submissions.^[27] Once it has decided on its recommendations, the committee reports to the House.

The House, in turn, recommends to the Governor-General, by way of an address, the Estimates that are to be included for the Offices of Parliament in the Appropriation Bill to be presented to the House for that year.^[28] The House is not bound to follow the Officers of Parliament Committee’s recommendations in making its recommendations for inclusion in the Appropriation Bill, but it invariably does so. Similarly, the Crown is not legally bound to include the recommended amounts in the Appropriation Bill, although it is an established convention that it will do so since Ministers have been a party to the address from the House recommending those amounts in the first place. On one occasion when the amount for an Office of Parliament included in an Appropriation Bill differed from that recommended by the House, the Officers of Parliament Committee drew the discrepancy to the attention of the Prime Minister and the Minister of Finance, expressing its concern at the variation. The Ministers assured the committee that it was the result of an administrative error, and that there was no intention to infringe the rights of the House.^[29]

Any alteration during the course of the financial year to the Estimates so approved is subject to a similar procedure of recommendation by the Officers of Parliament Committee^[30] and commendation by the House to the Governor-General by way of address.^[31] Such altered Estimates are included in the Appropriation Bill setting out the Supplementary Estimates of expenditure.

The appropriations for outputs supplied by the Offices of Parliament are included in separate votes administered respectively by the offices. The Speaker rather than a Minister is responsible for these votes.^[32] Each vote is examined by a subject select committee in the Estimates examination, in the same way as any other vote.”

[Footnotes:

¹⁰⁹ Harris and Wilson, above n 52, at 548.

- [24] Public Finance Act 1989, s 26E(1).
- [25] Public Audit Act 2001, s 36.
- [26] SO 395(1)(a).
- [27] Officers of Parliament Committee, report on alterations to the 1999/2000 appropriations and 2000/01 draft budgets for Vote Audit, Vote Ombudsmen and Vote Parliamentary Commissioner for the Environment (5 April 2000) [1999–2002] AJHR I.22A at 834–835.
- [28] Public Finance Act 1989, s 26E(3), (4).
- [29] Officers of Parliament Committee, special report on alterations to the 1991/92 appropriations for Vote Audit (4 June 1992) [1991–1993] AJHR I.21 at 36–45.
- [30] SO 395(1)(a).
- [31] Public Finance Act 1989, s 26E(6).
- [32] Public Finance Act 1989, ss 2(1) and 7C(4).]

Attachment B to this submission includes, by way of example, relevant documents that have been published in respect of the most recent consideration of funding decisions for the New Zealand Ombudsman:

- (a) Main Estimates for 2019/20 (together with Supplementary Estimates for 2018/19) provided by the Chief Ombudsman to the Officers of Parliament Committee on 31 January 2019.
- (b) The advice provided by Treasury to the Committee on 4 March 2019.
- (c) The final report of the Officers of Parliament Committee, including its recommendation that the House commend the budgets of the Officers of Parliament to the Governor-General and requests that they be incorporated into an Appropriation Bill.

The Chief Ombudsman of New Zealand has told our office that the process provides a clear, transparent and appropriately independent process for the funding of Offices of Parliament.

3.2 The Victorian approach

The integrity landscape in Victoria is currently undergoing a series of large-scale changes. These include reforming the way in which the Ombudsman and other core integrity bodies are funded.

Part 5 of the *Integrity and Accountability Legislation Amendment (Public Interest Disclosures, Oversight and Independence) Act 2019* is aimed at providing greater budget independence for the Ombudsman, the Independent Broad-based Anti-corruption Commission and the Victorian Inspectorate. For the Ombudsman, this will involve a range of amendments to the *Ombudsman Act 1973*. These will include the Ombudsman’s budget being determined each year in consultation with the Parliamentary Integrity and Oversight Committee.

The Ombudsman must also provide the Committee with a draft annual plan outlining the Ombudsman’s proposed work for the coming financial year. The Committee must consider the plan and provide comment it has before the plan is finalised. The Ombudsman then submits the final annual plan to Parliament. The Ombudsman will be required to include

an account of the implementation of the annual plan approved by the Committee in his or her annual report to Parliament.

The Victorian Parliament will be able to appoint an independent performance auditor to review the work of the Ombudsman. The auditor must conduct a review of the Ombudsman's performance once every four years and, subject to any directions by the Parliamentary Committee, may exercise the powers of the Auditor General.

Part 4: Budget process design considerations

In this part we offer a number of high-level design considerations that we submit should be factored into any new or enhanced budget process. These considerations have been identified as ameliorating some of the weakness identified with the current budget process (set out in Part 2), and picking up what we see as best practice approaches from elsewhere and in particular New Zealand (see Part 3).

It is worth observing, however, that some of the weaknesses identified with the current budget process may, to some extent, be unavoidable in *any* budget process that applies to independent oversight bodies, simply by virtue of their unique position in the framework. Further, some of those problems may relate as much to the small size of these organisations as it does to their particular natures and functions. (That said, being *both* small *and* fully independent may exacerbate some problems. For example, while diseconomies of scale will apply to all small agencies, independent agencies are unable to mitigate the problem by sharing corporate services with the larger agencies that they oversight and may potentially investigate.)¹¹⁰

Nevertheless, it is submitted that a different budget process can and should be developed to address some of the worst failings of the current process, while balancing other risks. For example, and most importantly, any new process must ensure that the independent oversight bodies themselves remain appropriately accountable.

The following are core considerations (based largely on the New Zealand model) that we think are critical for any alternative or enhanced budget process:

1. The budget setting process should be overseen by a Parliamentary Committee rather than by Treasury/Cabinet

It may make sense to have a single Parliamentary Committee perform the budget setting role for all of the independent oversight bodies. This may enable it to develop a degree of expertise in scrutinising budget proposals. Proposals put forward by each body could also be considered by the Committee as an indirect yardstick against which to assess others.

Whether that Committee should also be the Committee that performs the existing performance oversight role for each of the bodies is an open question.

What is important is that the Committee be comprised of members who are not Ministers, and who are broadly representative of the Parliament. As Gay and Winetrobe have noted:

“Issues of appointment and budget control are important and are not merely window dressing. International experience in Canada, South Africa and Australia has shown how the executive can cut budgets and can interfere with the appointments process when watchdogs do not behave as the Government of the day would wish. This is why Parliament needs to have effective institutional mechanisms to ensure some independence of action. In the

¹¹⁰ It is noteworthy that one of the main drivers for the move to a ‘cluster’ approach in the NSW Public Service was to enable the use of shared corporate services to reduce administrative costs. However, the Schott Commission of Audit recognised that corporate services would continue to be undertaken by the various independent accountability institutions themselves, rather than through shared corporate services: see Schott, K, NSW Commission of Audit – Final Report (Government Expenditure), 4 May 2002, available at <https://www.treasury.nsw.gov.au/sites/default/files/pdf/NSW_Commission_of_Audit_Final_Report.pdf> at 413. This does not mean, however, that consideration could not be given to the potential for some sharing of services or resources between the independent oversight bodies themselves: see below fn 116.

Westminster system of course, parliament and executive are fused, and governments have a major role in influencing the decisions of the parliament. This is where committees formed mainly or solely by backbenchers are important in preserving the institutional independence of a parliament. An Officer of Parliament committee would not necessarily prevent budget cuts, but would at least provide a transparent forum for discussion.”¹¹¹

2. Treasury/the Government must be given the opportunity to provide advice on funding, and all advice should be made public

It is imperative that the independent oversight bodies remain accountable and that any alternative budget process not result in a ‘blank cheque’.

Treasury is best positioned to scrutinise funding proposals and provide advice to the Parliamentary Committee, and it should do so. Critically, however, both the funding proposal from the oversight body itself and any advice from Treasury should be given openly and transparently, and with the opportunity for the oversight body itself to review and comment on it.

(The only exception to this open publication requirement would be if it is necessary to redact certain aspects of a funding proposal or advice, for example because it relates to an unannounced investigation that could be prejudiced by premature publication.)

As with the New Zealand process, there should be a shared understanding that, once the Parliamentary Committee has considered all of the relevant advice, including the Treasury advice, and has set a funding quantum, that amount should not then be re-opened by the Government by way of Parliamentary amendment.

3. The budgets for Parliament and the independent oversight bodies should be set in advance of the Government budget setting process

Treasury and the Executive Government have responsibility for setting and managing the overall State budget and they therefore need the certainty, when setting Departmental and executive agency budgets, of knowing the fiscal envelope within which they are operating. This includes with regard to fiscal constraints, including those provided for in the *Fiscal Responsibility Act 2012*.

For this reason, the budgets of the independent oversight bodies (and Parliament) need to be provided to Treasury as inputs *before* it sets the budget for all other agencies.

4. The budgets for Parliament and the independent oversight bodies should each be assessed separately

For the same reasons as competition for budget funding between the Executive and the oversight bodies is problematic, so too any new budget process must avoid the risk of a zero-sum competition for funds between the oversight bodies

¹¹¹ Gay O and Winetrobe B (2003) ‘Officers of Parliament - Transforming the role’, The Constitution Unit, University College London, p 68, cited in ACT Parliament, Standing Committee on Administration and Procedure, above n 44, at 55.

themselves. For example, to give Parliament a single funding allocation for itself and all of the oversight bodies, with discretion as to how to divide that up, would raise the same sort of tensions and conflicts that now exist with respect to the Executive setting the budget.

Instead, the funding need and provision for each of the bodies should be determined separately having regard to the particular statutory mandate and functions of that particular body.

5. In setting the budgets for the Parliament and the independent oversight bodies, advice from Treasury and the Government on the overall fiscal position of the State may be relevant

Notwithstanding (4) above, the quantum of funding for the independent oversight bodies should not be set in a total vacuum and without any regard at all to the overall condition of the State's financial capacity. It seems highly unlikely, given the relative paucity of the combined budgets of all the oversight agencies as a fraction of the overall State budget, that they could ever seriously impact the State's fiscal position. Nevertheless, questions of overall fiscal affordability may not be entirely irrelevant.

6. Government should retain the ability to approve additional grant funding for oversight bodies, for example where their work contributes to the Premier's Priorities and other Government-set outcomes

Generally, Government priorities outside of the statutory objects of the relevant oversight body should have no role to play in the Parliamentary Committee's consideration of the funding to be appropriated to an oversight body. What matters is not whether its functions serve a "Government priority"; it is that they fulfil a statutory mandate.

However, if work of the body otherwise contributes to the Government's priorities, there seems no reason to preclude the Government from agreeing to provide additional grant funding to support that work. Provided the budget process otherwise ensures that funding for the body's core oversight work remains both sufficient and certain, allowing additional funding does not necessarily raise concerns regarding independence.¹¹²

7. Budgets for independent oversight bodies need to be set having regard to the particular statutory mandates and business models of each body, which will differ

Although the independent statutory bodies share certain features and a general concern with what might be called 'rule of law' values, their work and business models are quite divergent. These differences must be accommodated. Even though the same budget process may be applied to all of the oversight bodies, the

¹¹² In similar ways, a number of the oversight bodies provide certain services to Government for a fee such as training (Ombudsman) and audit services (Audit Office).

manner in which those bodies are ultimately funded as a result of that process may be quite different.

For example, for an agency like the Ombudsman, the primary concern will be to ensure sufficient and certain funding year-on-year against which to plan and prioritise its investigations and other activities. The Electoral Commission, however, may have quite different needs. It may need certainty of funding over a multi-year period, so as to give it the flexibility to scale up and scale down its organisational staffing appropriately across the electoral cycle.

8. Funding should be considered and adjusted whenever functions or jurisdictions change

It is imperative that, if new functions are conferred on an independent oversight body, adequate funding to undertake those functions should necessarily follow. Likewise, if a function is no longer required to be performed, funding should be reduced.

Accordingly, whenever any legislation is introduced into Parliament or other action is taken that, directly or indirectly, alters the functions or jurisdiction of an oversight body, there should be a clear understanding that the funding implications will need to be considered by the Parliamentary Committee, and appropriate funding adjustments made, before those changes take effect.

9. Quarterly reviews may be needed to allow for the repurposing of unused contingency funding and/or providing supplementary funding requests

If the independent oversight bodies are provided with full and proper funding at the beginning of the year, it is less likely that they would need to seek supplementary funding during the course of the year.

That said, consideration may still need to be given to including some mechanism in the budget process to allow for requests for supplementation in exceptional circumstances (such as where the ICAC is required to embark on an urgent, unexpected investigation into serious corruption). One option may be to consider a provision similar to the existing section 4.13 of the *Government Sector Finance Act 2018* (which authorises the Treasurer, with the approval of the Governor, to pay additional money out of the Consolidated Fund to meet an exigency arising after the annual *Appropriation Act* has already been enacted, with an obligation to then include that amount in the presentation of the next year's Budget).

10. The budget setting process should be embedded in legislation

The kind of Parliament-led budget process proposed here would need to be embedded in legislation. Doing so will also perform an important symbolic task of re-enforcing the independence of the bodies to whom the process is to apply.

11. The independent oversight bodies should continue to be held accountable for their financial management and performance, in particular to their Parliamentary oversight committee

The oversight bodies (and Parliament) should be subject to a rigorous and transparent budget process.

This should supplement, and not replace, other existing avenues of accountability including judicial review, oversight by other oversight bodies (such as Inspectors, where relevant), audit by the Auditor General, internal oversight (such as through Audit and Risk Committees) as well, most importantly, as continued oversight by their joint Parliamentary Committees.

In respect of the latter, the Parliamentary Committee should be explicitly charged with comparing, and reporting on, the activities and achievements of the oversight body against the plans that it put forward as needing to be funded at the beginning of the year. Consideration could be given to explicitly empowering the Committee to seek expert external advice if it has doubts about the bodies' performance, or otherwise considers that expert advice is needed for it to opine on the effectiveness and efficiency of the oversight body's expenditure of its funds.¹¹³

12. The independent oversight bodies should no longer be publicly represented as forming part of the "DPC cluster"

Presenting the independent oversight bodies within a 'cluster' led by DPC may contribute to a perception that those bodies are in some way answerable to DPC and that DPC has some responsibility (including in a financial sense) for them.

When clusters were first established, there was a clear understanding that these bodies would continue as wholly independent bodies. That understanding may have weakened over time. For example, the so-called "blue chart" of clusters published by DPC in 2011 expressly noted that certain bodies (such as the Ombudsman and the ICAC) were the subject of separate appropriations and reported independently to Parliament.¹¹⁴ Those notes no longer appear on today's blue chart, with those agencies simply listed by name under DPC in a row titled "separate agencies".¹¹⁵

¹¹³ The Victorian legislation provides for the relevant Parliamentary Committee to appoint a performance auditor to review the Ombudsman's performance once every four years: see section 3.2 above.

We do not think this level of prescription is necessary. Depending on the circumstances and the particular body in question, the Parliamentary Committee may consider it necessary to engage external assistance more or less frequently than this. The important thing is that the Parliamentary Committee have the ability to engage assistance as necessary. That said, we can see a risk that, if the Committee is given a general power to engage an external reviewer, this might lead to a risk that the Committee will feel that it is expected that it will do so each and every year, even where it is not necessary. Given that risk, consideration could be given to limiting the discretion so as to provide that such a review is not to be conducted any more frequently than, say once every three of four years.

¹¹⁴ Reproduced in Schott, K, *NSW Commission of Audit Interim Report (Public Sector Management)*, 24 January 2012, available at < http://nswtreasury.prod.acquia-sites.com/sites/default/files/2017-03/NSW_Commission_of_Audit_InterimReport_Public_Sector_Management_web_dnd.pdf>, at 16.

¹¹⁵ Published at <<https://www.dpc.nsw.gov.au/assets/dpc-nsw-gov-au/371fe4cd56/Governance-Arrangements-Blue-Chart.pdf>>. See also n 65 above.

Moving the independent oversight bodies out of the DPC cluster will also clarify DPC's accountability for its own cluster budget.

If thought necessary for the purposes of maintaining a comprehensive "blue chart", the independent oversight agencies could be presented there as a separate 'integrity' cluster or group. Recognising this separate grouping may also facilitate a future conversation between them (together, perhaps, with the Parliamentary departments) about whether there may be opportunities within that group for co-ordinating or sharing certain services or procurement activities.¹¹⁶ Of course, any proposals along these lines would need to ensure that independence and oversight functions (including with respect to each other) are not compromised.

¹¹⁶ This possibility was flagged, without elaboration, in the Schott Commission of Audit Interim Report:

"A number of these independent bodies [within the Premier and Cabinet cluster] report to and are oversighted by Parliament and the Department of Premier and Cabinet has no role in their administration. These independent accountability entities may be more efficiently run if grouped together for administration."

above n 114, at 157.

Attachment A: The current NSW budget process – relevant legislation

Constitution Act 1902

Part 5 of the *Constitution Act 1902* provides for the appropriation of funds from the consolidated fund to “such specific purposes as may be prescribed by any Act in that behalf.”

The Annual Appropriation Act

The *Appropriation Act 2019* provided the sum of \$29,045,000 to the Premier out of the Consolidated Fund for the NSW Ombudsman Office in 2019-2020.¹

Government Sector Finance Act 2018

Section 2.5 of the *Government Sector Finance Act 2018 (GSF Act)* classes the Ombudsman’s Office, along with certain other integrity bodies, as a **separate GSF agency**.

2.5 Separate GSF agency

(1) *Each of the following is a separate GSF agency:*

- (a) *the Audit Office,*
- (b) *the Independent Commission Against Corruption,*
- (c) *the Judicial Commission of New South Wales,*
- (d) *the New South Wales Electoral Commission,*
- (e) *the Ombudsman’s Office,*
- (f) *any other entity (or an entity of a kind) prescribed by the regulations as a separate GSF agency.*

(2) *Despite any other provision of this Act, a separate GSF agency (and the accountable authority for the agency and its government officers) are each not required to comply with a relevant Treasurer’s requirement or Minister’s information requirement if the accountable authority considers that the requirement is not consistent with the exercise of the statutory functions of the agency.*

(3) *A relevant Treasurer’s requirement is:*

- (a) *a provision of the Treasurer’s directions that a separate GSF agency (or the accountable authority for the agency or its government officers) would be required to comply with but for this section, or*
- (b) *any other direction, request or other requirement given or made by the Treasurer under this Act that a separate GSF agency (or the accountable authority for the agency or its government officers) would be required to comply with but for this section.*

(4) *A Minister’s information requirement is any direction, request or other requirement given or made by a Minister under this Act for the provision of information about a separate GSF agency that the agency (or the accountable authority for the agency or its government officers) would be required to comply with but for this section.*

(5) *The accountable authority for a separate GSF agency must ensure that a written document (a non-compliance reasons statement) stating the reasons for any non-compliance with a relevant Treasurer’s requirement or Minister’s information requirement is:*

¹ This amount includes the funding for ERCPD, which is expected to be transferred to the Office of the Children’s Guardian: see n 5 above.

(a) given to the Treasurer or other Minister who gave or made the requirement as soon as practicable after it is decided not to comply, and

(b) included in the annual reporting information for the separate GSF agency for the annual reporting period during which the non-compliance occurred or reported in any other way prescribed by the regulations.

(6) Without limiting subsection (5) (b), the regulations may make provision for or with respect to the tabling of non-compliance reasons statements in Parliament (including by providing for the application of section 9.12 to the tabling).

Under section 2.6 of the GSF Act, “the Minister who administers the constituent Act for the agency” is designated as the **responsible Minister** for that GSF agency. In the case of the Ombudsman this is the Premier and the Special Minister of State.

Under section 2.7 of the GSF Act, the Ombudsman is designated the **accountable authority** for the Ombudsman’s Office.

Part 4 of the GSF Act deals with the preparation of Budget papers and appropriations. Of most relevant here is section 4.5.

4.5 Provision of budget information by GSF agencies

- (1) The accountable authority for a GSF agency must, in accordance with directions by the Treasurer, prepare information for use in Budget preparations concerning the agency and its controlled entity for the times and in the manner directed.
- (2) Any directions under this section may be contained in the Treasurer’s directions or in a separate written document given to the GSF agency concerned.

Government Sector Employment Act 2013

The *Government Sector Employment Act 2013* (**GSE Act**) establishes the Public Service, provides for public sector governance and employment, and provides an ethical framework for the public sector.

Schedule 1 of the GSE Act outlines several categories of public service agencies. This includes eight Departments, 23 Executive Agencies related to Departments, and 17 “separate agencies”. This final category includes the Ombudsman’s Office. The Ombudsman is designated the head of that agency, with employer responsibility for all of his senior executive and non-senior executive staff.

Cluster arrangements

For the last decade, the NSW public sector has structured itself around a number of core Departments. These have grouped a wide range of agencies into ‘clusters’ of broadly related subject matter or responsibility. The number of clusters has changed over time, and there are currently eight.

The concept of ‘cluster’ is not formally created by any legislation. However, under the GSE Act some public service agencies are established as effectively subsidiaries of a principal department, for example by providing for the Secretary of the principal department to exercise the employer functions in respect of the executive staff of the agency. Otherwise, clusters are given shape by the practices of Government (for example, of appropriating all funding to bodies in the DPC cluster to the Premier, who then has the power to delegate expenditure powers, and by appropriating amounts in the *Appropriation Act* to a

Department for the purpose of “cluster grants and other adjustments” to agencies within its cluster).

Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission

Section 31B of the *Ombudsman Act 1974* provides the Committee with the following functions and limitations on its powers:

31B Functions

The Joint Committee has the following functions under this Act:

- (a) to monitor and to review the exercise by the Ombudsman of the Ombudsman’s functions under this or any other Act,*
- (b) to report to both Houses of Parliament, with such comments as it thinks fit, on any matter appertaining to the Ombudsman or connected with the exercise of the Ombudsman’s functions to which, in the opinion of the Joint Committee, the attention of Parliament should be directed,*
- (c) to examine each annual and other report made by the Ombudsman, and presented to Parliament, under this or any other Act and to report to both Houses of Parliament on any matter appearing in, or arising out of, any such report,*
- (d) to report to both Houses of Parliament any change that the Joint Committee considers desirable to the functions, structures and procedures of the Office of the Ombudsman,*
- (e) to inquire into any question in connection with the Joint Committee’s functions which is referred to it by both Houses of Parliament, and to report to both Houses on that question.*

(2) Nothing in this Part authorises the Joint Committee:

- (a) to investigate a matter relating to particular conduct, or*
- (b) to reconsider a decision to investigate, not to investigate or to discontinue investigation of a particular complaint, or*
- (c) to exercise any function referred to in subsection (1) in relation to any report under section 27, or*
- (d) to reconsider the findings, recommendations, determinations or other decisions of the Ombudsman, or of any other person, in relation to a particular investigation or complaint or in relation to any particular conduct the subject of a report under section 27, or*
- (e) to exercise any function referred to in subsection (1) in relation to the Ombudsman’s functions under the Telecommunications (Interception) (New South Wales) Act 1987.*

(3) The functions of the Joint Committee may be exercised in respect of matters occurring before or after the commencement of this section.

Attachment B: New Zealand budget process – example reports



31 January 2019

Chairman and members of the Officers of Parliament Committee

Vote Ombudsman

Attached is a copy of the Vote Ombudsman Budget Proposals including Supplementary Estimates for 2018/19 and Main Estimates for 2019/20 for your consideration.



Peter Boshier

Chief Ombudsman

VOTE OMBUDSMAN

Budget 2019: Budget Proposals

Submitted by

Peter Boshier
Chief Ombudsman

31 January 2019

Executive Summary

The Ombudsman is an independent, impartial watchdog for Parliament and an international monitoring mechanism for the United Nations on the use of executive powers and the exercise of administrative discretion to ensure that people are being treated fairly and consistently with New Zealand's international obligations. The Ombudsman does this by:

- investigating complaints received from individuals;
- monitoring and inspecting agencies' administrative practices;
- intervening to seek resolution or where necessary investigate agencies' practices on our own volition if we see a trend or an issue that gives rise to a concern that something unfair or unreasonable may be occurring; and
- training, advising and educating agencies to assist wider administrative improvement and better public administration in the state sector.

My Office operates in an environment where both domestic and international stakeholders have appropriately high expectations, and there is a significant demand for our services. I currently have authority over approximately 4,000 agencies in the public sector and recently received a new designation in respect of private sector facilities funded by and/or accountable to the public sector in the detention of aged care recipients. Our ability to meet these expectations depends on my Office's capacity and capability to carry out its functions and deliver its agreed outcomes effectively and in a timely manner.

When I took up Office as Chief Ombudsman on 10 December 2015, there were a large number of unacceptably aged investigations that the office had been unable to complete within 12 months of receipt, delays in progressing current complaints were protracted, our voluntary staff turnover levels were on track to reach another record level of 20%, and the Office operated under an inflexible, inefficient model where opportunities for early intervention and proactive systemic inquiry were unable to be taken readily.

However, with the support of this Committee, I was able to undertake a comprehensive review of the Office's work practices, management structure and operating model.

The New Zealand Office of the Ombudsman is now more flexible and efficient. It operates under a single Ombudsman model and is able to meet the performance measures agreed with Parliament, respond readily to complainants and help public sector agencies to improve their services. Notably at 31 December 2018

- 76% of all OIA, LGOIMA and OA complaints received by my Office are now being completed within three months of receipt, and 95% percent within nine months of receipt;
- We have been able to meet a 63% increase in demand for our advice or guidance from public sector agencies;
- Voluntary staff turnover levels are at a healthy 7.5%; and

- Our biennial staff satisfaction survey results were outstandingly high, with over 95% of the staff who responded to our survey said they have trust and confidence in the vision and strategic direction of the Office, are proud of the work that they do and believe their work has meaning.

By having a high performing and agile workforce within my office, I am also now able to take a proactive role in ensuring the quality of the systems, services and decisions provided by the government that impact on people, and identifying at an early stage any systemic improvements needed in order to prevent unfair practices or decisions that could otherwise result in complaints. In this regard, I am pleased to advise the Committee that at 31 December 2018 I have:

- increased the intensity of our inspections of prisons under our UN OPCAT role, by ensuring that at least two thirds are unannounced (currently 96%);
- completed four, and have underway another eight self-initiated investigations into central and local government agencies' OIA/LGOIMA practices, systems and compliance.
- intervened at an early stage to resolve a potential issue with how a government agency is handling its official information requests; and
- commenced two proactive investigations into critical aspects of the government's reporting and facilities to care for people with intellectual disabilities that have given me cause for inquiry.

My priorities for the office over the next 4 years are to:

1. manage the high demand for Ombudsman services by continuing to embed the new single-Ombudsman model and promoting an agile and high-performing workforce within the Office;
2. fulfil our UN monitoring obligations under our recently revised OPCAT designation (which increases significantly the amount of facilities I am required to monitor i.e. by more than 250%¹), by implementing a stage expansion of this role across the next three years;
3. retain our highly trained and experienced staff after suffering intolerably high levels of voluntary staff turnover between 2014 and 2016, by paying them fairly and in accordance with current market rates; and
4. maintain our international leadership role in promoting integrity and supporting anti-corruption integrity agencies by delivering an Ombudsman Institutional Support programme in the Asia-Pacific region.

¹ In addition to the 110 facilities I already have responsibility for monitoring under the OPCAT, the expanded designation I received in June 2018 requires me to inspect 227 privately run aged care facilities, 475 court cells in 58 court locations, as well as additional locations outside prisons where person may be detained in the custody of the Department of Corrections.

The relevant additional capital funding and baseline changes I am requesting which will enable me to achieve this are set out in the following table. Notably, most of this year's budget submission is devoted to giving effect to the recently expanded OPCAT designation which spans the examination and monitoring the treatment of people detained in the custody of the Department of Corrections, court facilities and in privately run aged care facilities:

	2018/19 \$(000)	2019/20 \$(000)	2020/21 \$(000)	2021/22 \$(000)	2022/23 & outyears \$(000)
Priorities					
Monitoring places of detention		4,243	6,709	9,136	9,196
Retaining our trained, experienced staff		370	643	922	1,207
Accommodation costs increase	72	74	74	74	74
Legal costs	70				
International support and leadership		936	1,091	951	1,091
Total operating funding sought Vote:	142	5,623	8,517	11,083	11,568

Note these costs include salaries, other personnel, operating, depreciation and capital charge where applicable.

	2018/19 \$(000)	2019/20 \$(000)	2020/21 \$(000)	2021/22 \$(000)	2022/23 & outyears \$(000)
Capital Expenditure					
Priorities					
Monitoring places of detention		1,751	402	568	
International support and leadership		128			
Total capital funding sought Vote:	0	1,879	402	568	0

Overview

The Ombudsman is an independent, impartial watchdog for the New Zealand Parliament and an international monitoring mechanism for the United Nations on the use of executive powers and the exercise of administrative discretion in New Zealand, to ensure that people are being treated fairly and, when relevant, consistently with our country's international obligations. The Ombudsman does this by:

- investigating complaints received from individuals;
- monitoring and inspecting agencies' current administrative practices;
- intervening to seek resolution or where necessary investigate agencies' practices on our own volition if we see a trend or an issue that gives rise to a concern that something unfair or unreasonable may be occurring; and
- training, advising and educating agencies (and making information available to the public) to assist systemic improvement and better administration in the public sector.

The Ombudsman operates in an environment where both domestic and international stakeholders have high expectations, and there is a significant demand for our services. The ability to meet these expectations depends on my Office's capacity and capability to carry out its functions and deliver its agreed outcomes effectively and in a timely manner.

When I took up Office as Chief Ombudsman in December 2015:

- there were a large number of unacceptably aged investigations that the Office had not been able to complete and protracted delays in progressing current complaints.
- the Office operated under an inflexible, inefficient model where opportunities for early intervention and proactive systemic inquiry were unable to be taken readily.
- staff morale was low, remuneration levels were three years behind current market rates, and our trained and experienced staff had limited opportunities for extension or promotion. Voluntary staff turnover was at record levels.

As a result, the public's trust and confidence in the New Zealand Ombudsman to carry out the role effectively was deteriorating and the Office was being criticised for no longer being a relevant option for people needing a timely review of a decision when they felt they had been treated unfairly.²

² "Senior lawyers say that although the Ombudsmen's investigations are thorough and fair, they are no longer referring clients to the Ombudsmen if there is an alternative. The process takes too long and irreparable damage may be done to their clients' interests before the investigation can be completed." *Transparency International New Zealand National Integrity System Assessment Report December 2013, page 215.*

With the support of this Committee, I was able to undertake a comprehensive review of the Office's work practices, management structure and operating model during my first 18 months as Chief Ombudsman. This culminated in:

- the rationalisation and modernising of our work processes and practices;
- the implementation of a robust delegations framework; and
- a streamlined reorganisation of our management and operating structures.

The Office now operates a more flexible, high performing single-Ombudsman model which is able to demonstrably deliver to performance measures agreed with Parliament, be responsive to complainants, ensure people's rights are protected and restored and assist public sector agencies to improve their services.

Since July 2018, my Office is also able take a more proactive approach to identify, resolve and investigate significant and systemic issues, review and monitor compliance and current practices operating within agencies, and provide advice and guidance. To carry out this work, my staff are provided with internal promotions and secondment opportunities and, when necessary, temporary contract resource is also sought. By having a high performing and agile workforce within my office, I am now able to take an active role in ensuring the quality of the systems, services and decisions provided by the government that impact on people, and identifying at an early stage any systemic improvements needed in order to prevent unfair practices or decisions that could otherwise result in complaints.

It is as a direct result of the Committee's support and this new model that I am in the position to advise that at 31 December 2018:

- 76% of all OIA, LGOIMA and OA complaints received by my Office are now being completed within three months of receipt, and 95% percent within nine months of receipt.
- I have increased significantly the intensity of our inspections of prisons under our UN OPCAT role, including by ensuring that at least two thirds are unannounced (currently 96%), applied new inspection criteria and commenced the publication of our comprehensive reports and findings.
- I have completed four, and have underway another eight self-initiated investigations into central and local government agencies' OIA/LGOIMA practices, systems and compliance which are all on track for completion before the end of this reporting year.
- I have initiated one formal early resolution intervention into a potential systemic issue that I was concerned could be giving rise to a growing number of complaints about how a government agency is handling official information requests.
- I have commenced two proactive investigations into critical aspects of the government's reporting and facilities to care for people with intellectual disabilities.

- I am meeting the significant increase in demand (63%) for our advice or guidance from public sector agencies.³ I have already issued 17 new guides to assist public sector agencies on key areas of their work (particularly in the handling of official information requests). I have also been working closely with the Chief Executive of the Department of Prime Minister and Cabinet in his capacity as Head of the Policy Profession to develop targeted statements of principle on areas officials find particularly complex e.g. access to free and frank advice during the early stages of policy development
- Voluntary staff turnover levels have reduced to a healthy 7.5%. Our staff satisfaction survey results this year were outstandingly high. Over 95% of the staff who responded to our survey said they have trust and confidence in the vision and strategic direction of the Office, are proud of the work that they do, believe their work has meaning, and have a good relationship with their manager.⁴

My work is a balance between:

- A proactive focus on identifying, resolving and investigating systemic issues, monitoring compliance and good practice, and providing advice, guidance and training; and
- A reactive focus on resolving complaints from the public about government administrative conduct and access to official information.

This modern Ombudsman model has enabled me to provide Parliament with assurance that there is robust, independent oversight over the use of executive power and administrative discretion. Of course, the result of this work is that people's rights are protected and restored. The model allows me take on new or extended jurisdictions if requested relatively seamlessly and it is recognised by international Ombudsmen and Information Commissioners as flexible and worthy of application within their own jurisdictions.

It is therefore my Office's strategic priorities for 2019-20 to continue to embed this new model whilst managing the high demand for, and expansion of, Ombudsman services, and ensuring our critical assets, particularly the retention of my staff, are protected and our leadership role as an anti-corruption integrity oversight agency in the Asia-Pacific region is maintained.

³ This includes Ministers' offices.

⁴ Office of the Ombudsman biennial Staff Satisfaction Survey, October 2018.

Strategic direction and priorities

My strategic direction and priorities remain unchanged from those presented to Parliament on 29 June 2018 in the Ombudsman's Strategic Intentions for 2018-22. The pressures my Office faces and the challenges I foresee in achieving these are set out below.

Managing the impact of a high demand for services

The number of complaints and other contacts we have received about the administrative conduct and decisions of government agencies has remained consistently high for the last three years. In the 2017/18 reporting year, we received 11,468 complaints and other work and completed 11,846. Current indications are that this 2018/19 year will be similarly high, with 5,860 complaints and other work already received by 31 December 2018. Our new Office model has enabled us to complete 76% of all OIA, LGOIMA and OA complaints received by my Office within three months of receipt, and 95% percent within nine months of receipt.

Demand for our advice or comment from public sector agencies,⁵ particularly in the handling of official information requests, has increased dramatically during this first six months of the reporting year by 63%⁶. I have also been able to complete four systemic investigations into central government agencies OIA practices and have another eight self-initiated investigations into both central and local government agencies' OIA/LGOIMA practices, systems and compliance currently underway.

In addition, under my new model, my specialised systemic improvement monitoring, early resolution and investigation teams are currently monitoring 32 matters which may be a cause for concern. I may be required to initiate formal, targeted early resolution focused interventions, or if necessary, proactive investigations in order to satisfy the public interest issues identified that warrant further scrutiny by my Office. At the date of this submission, I have commenced one formal early resolution intervention and intend to announce two systemic improvement investigations next month.

I am confident that my Office will be able to meet the ongoing high demand for our services using our current permanent resources in flexible and agile ways such as promotion and secondment across teams, whilst also continuing to achieve efficiencies at each stage of the complaint handling process. I will therefore **not be seeking any further funding** support from the Committee for these areas. However, I wish to express my gratitude for the support and confidence the Committee provided me in the previous years to enable the Office to be in this position.

⁵ This includes Ministers' offices

⁶ We responded to 430 requests for advice or comment in the 2018 calendar year, as compared to 264 in 2017

Monitoring the treatment of people in places of detention

A core part of the Ombudsman role as Parliament's independent watchdog over executive power is its proactive monitoring of how people are treated in places of detention. This is a United Nations inspection role to which the New Zealand Government committed, when it signed the Optional Protocol to the Convention against Torture (OPCAT) in 2003 and ratified it in 2007 by amending the New Zealand Crimes of Torture Act 1989.

The Ombudsman is specifically designated as a National Preventive Mechanism (NPM) to regularly monitor and inspect the facilities and treatment of people detained in New Zealand's prisons, health and disability places of detention, youth justice and child care and protection residences and immigration detention facilities.

The role requires me to carry out both announced and unannounced in-depth inspections as well as shorter ad-hoc visits of these facilities on a regular basis with a view to identifying conditions that could give rise to cruel, inhuman or degrading treatment or punishment, and recommending practical improvements that will ensure there are sufficient safeguards in place and any risks, poor practices or systemic problems are addressed. Last year, I reported to the Committee that my Office has identified 110 facilities falling within our jurisdiction that we were currently responsible for inspecting under the OPCAT.

All OPCAT inspection teams are expected to comprise 8 people with a variety of relevant professional expertise⁷ including lawyers, doctors, psychologists and psychiatrists, persons with prior knowledge of administering prisons and psychiatric institutions and persons with prior experience working with vulnerable groups; migrants, juveniles, people with mental disabilities and indigenous people.

At present, my Office is funded for one inspection team to monitor the 110 facilities that fall within my OPCAT designation (prior to the expansion in role last June). As a result, it currently can take up to four years before an Ombudsman is able to visit a detention facility and carry out the type of in-depth inspection expected of us in order to identify critical issues and root causes of any poor systems and practices. In the 2017/18 year we visited 39 places of detention, including 12 full inspections.

Expansion of designation

On 6 June 2018, I was advised that the OPCAT designation for the Ombudsman had been extended to include examining and monitoring the treatment of persons detained in the custody of the Department of Corrections,⁸ court facilities and in privately run aged care facilities. While I welcome these additional responsibilities, I advised the Ministry of Justice at the time that I would need to seek Parliament's agreement for a significant increase in

⁷ UN Special Rapporteur on Torture, 2006 Report to the General Assembly, UN Doc.A/61/259, Para 70.

⁸ That is where persons are in the custody of Corrections outside of a prison, such as when being escorted to court in a prison van.

resources to undertake regular monitoring and inspection of these additional facilities. Since that decision, I have:

- initiated a scoping exercise to understand the breadth of my remit in these areas,
- met with key members of the sectors to introduce my UN monitoring role (and indeed the role of the Ombudsman) to the private sector- many of whom were not familiar with my Office and its capabilities;
- identified the location of the additional facilities that would require monitoring under this new designation; and
- identified the costs involved for my Office to carry out this work effectively as expected by both Parliament and the United Nations.

As a result, the number of facilities that I am required to monitor and inspect regularly has increased significantly as follows:

- an additional 227 privately run aged care facilities;
- an additional 58 court locations (475 court cells) where persons can be detained; and
- additional locations outside prisons where persons may be detained in the custody of the Department of Corrections, including in prison vans, hospitals and employment settings.

In order to ensure we fulfil our obligations as a National Preventive Mechanism under the UN OPCAT in respect of our extended designation for monitoring the significant number of court cells and privately run aged care facilities, as well as those detained in the custody of the Department of Corrections outside prisons, I require funding for three additional fully resourced, multi-disciplinary inspection teams.

Without this funding, our inability to meet fully our UN monitoring obligations under the OPCAT may enable instances of inhuman or degrading treatment to occur and continue undetected. Unfortunately, New Zealand is not immune from acts that amount to cruel, inhuman or degrading treatment or punishment. In the most recent 2017/18 reporting period I had cause to make 149 recommendations (of which 137 were accepted) in respect of the places of detention that were inspected. In addition to the obvious serious humanitarian consequences for the detainees concerned, this leaves the New Zealand Government vulnerable. The Crown could face serious financial liability as the result of any failure to identify and address these concerns. The potential costs include compensation claims for breaches of rights, and legal, medical and rehabilitation costs. Wider erosion of public trust and confidence in the justice, health and aged care systems will also result.

Recruiting and training three additional teams for this work will be a significant task for my office to undertake. As Chief Ombudsman, I consider it prudent for both the sector and my Office, that I deliver a staged expansion of this role across the next three years, rather than seek an immediate one-off substantial increase to the Vote in the 2019/20 year. Therefore, my request to the Committee is for their commitment to the appropriation for this work, but in the form of incremental increases across three years as set out below.

I also ask the Committee to note the significant projected growth of people in New Zealand with dementia by 2050 i.e. 173% increase⁹, many of whom will be expected to require residential care, means my Office may need to seek further resource support for this work in the years ahead.

	2019/20 \$(000)	2020/21 \$(000)	2021/22 \$(000)	2022/23 & outyears \$(000)
Number of FTE	17	26	35	35
Salaries	2,386	3,537	4,663	4,663
Other Personnel & Operating	1,644	2,699	3,891	3,891
Depreciation	160	356	436	479
Capital Charge	53	117	146	163
Total Operating	4,243	6,709	9,136	9,196
Total Capital	1,751	402	568	0

Protecting our assets – Retaining our trained, experienced staff

Our staff are our most important asset. Due to the breadth and complexity of the Ombudsman role and jurisdictions, it usually takes at least one year of intensive training for an investigator, inspector or advisor to be working independently. This is a significant investment for my Office. The work they do can be very difficult at times and complex. There is the emotional strain of dealing with aggrieved complainants, visiting people in places of detention, and dealing with people who make threatening demands. Losing a fully trained, experienced staff member can be extremely detrimental – not only to the progress and quality of our work, but also to our ability to stay on top of our workload and carry out timely and effective proactive interventions. In the 2014/15 and 2015/16 financial years, when the Office did not receive funding for remuneration increases, we experienced intolerably high levels of voluntary staff turnover of 20% and 18% respectively. These highly trained and experienced staff were lost to other organisations within the private and government sectors – many successfully ‘head hunted’ by better paying agencies.

Each year since I have been Chief Ombudsman, I have sought and received the Committee’s support to enable my staff’s remuneration to keep up to date with the current market “All Orgs” rates. I am grateful for this and, as a result, was able to report to the Committee last year that I had been able to recruit new staff to replace the experienced staff that had been lost and achieve significant results to demonstrate to Parliament a clear return on their

⁹ Alzheimer’s New Zealand, *Dementia Economic Impact Report 2016*, Deloitte Economics, March 2016, reports that in 2016 the prevalence of dementia in New Zealand was 62,287 people (which represents a 29% increase in five years) and is projected to increase to 170, 212 by 2050 <http://www.alzheimers.org.nz/getmedia/79f7fd09-93fe-43b0-a837-771027bb23c0/Economic-Impacts-of-Dementia-2017.pdf/>, page 8

investment. While the Committee agreed to a one-off payment to increase staff remuneration so that current salaries would be in alignment with the then current market rates, it declined my request for an ongoing 2.2% increase, which would enable me to keep pace with the market rates in 2019. However, when issuing its decision, the Committee noted and supported my proposal to move to a single-Ombudsman model from July 2018, and recognised this would require my staff to take on more responsibility that ought to be recognised and rewarded appropriately. It indicated in its report, that it would therefore be willing to review this request in 2019:

*In contrast with past times where there has been more than one Ombudsman, Judge Boshier plans to operate as the sole Ombudsman, and to devolve more responsibility to his staff. In doing so, he seeks the ability to reward their additional effort and responsibility. We note that a single-Ombudsman model will enable some cost savings. **We intend to review in a year's time whether, in light of the office's staff turnover and productivity, it will be appropriate to continue to make provision for additional payments [to retain and reward trained and experienced staff]**"*

I did not take the decision to move to the single-ombudsman model without a lot of soul-searching and consultation, within the office and with Mr Speaker. In fact, the achievements of this model has exceeded my expectations. There is now a real consistency in our approach and sense of direction. Our completion of work is easily meeting my high expectations, both in relation to our reactive complaints and our broader systemic investigative work. 76% of complaints are now being closed within three months, and 95% within 9 months of receipt by my Office. Of particular satisfaction is that our voluntary staff turnover is now sitting at 7.5%, suggesting a healthy and productive working environment exists within the office.

As an Officer of Parliament, my work involves multiple functions, roles and jurisdictions, and much of it is demand driven. Mine is an office of last resort for complainants. I do not have the ability to refer people elsewhere, charge out our services or generate savings to fund permanent wage increases. I am therefore constrained by the amount the Committee recommends Parliament provides me each year to remunerate my staff fairly when they perform so they will stay.

I am therefore seeking the Committee's support for a one-off increase in funding of \$208,276 to support the appropriate salary translation to current 2018 market rates to ensure I remain a competitive and attractive employer and am able to retain the staff that are delivering these results.

I also re-submit my request that the Committee supports ongoing funding in the form of an annual 2.2% increase from 2019/20 onwards, to incentivise and reward current staff for their high performance when they have exceeded expectations or delivered exceptional work.

Per year	2019/20 \$(000)	2020/21 \$(000)	2021/22 \$(000)	2022/23 & outyears \$(000)
Translation	208	0	0	0
Annual 2.2% Performance Pay	270	273	279	285
less previously funded	-108	0	0	0
Total per year	370	273	279	285

Protecting our assets – Office accommodation cost increase

Our Auckland, Wellington and Christchurch offices have faced increased office accommodation costs.

Auckland

The rent review for the Auckland office was due on 1 October 2018. The owner has proposed a 13.12% rent increase. An independent review has been undertaken and the reviewer has deemed the increase reasonable.

In addition, the building cost has increased by \$3,115 per year since 1 July 2018.

Wellington

The rent review for the Wellington office was due on 1 May 2018. The owner has proposed a 5.91% rent increase. An independent review has been undertaken and the reviewer has deemed the increase reasonable.

Christchurch

The annual CPI rent review for the Christchurch office indicated minimum change. However, the building manager has advised us of the increased building operating cost of \$10,000 per annum from 1 July 2018 onwards.

Vote Ombudsmen is unable to fund for these increases and therefore request approval of these additional accommodation costs:

	2018/19 \$(000)	2019/20 \$(000)	2020/21 \$(000)	2021/22 \$(000)	2022/23 & outyears \$(000)
Auckland	21	23	23	23	23
Wellington	41	41	41	41	41
Christchurch	10	10	10	10	10
Total Operating	72	74	74	74	74

Protecting our assets – Legal costs

Since July 2018, the office has incurred unexpected legal costs in the following matters:

- one judicial review arising from my decision to decline an application to use the name Ombudsman by a private sector entity; and
- one judicial review proceedings against a public sector agency in which the plaintiff has sought to join the Ombudsman as further defendant, which I am currently seeking to strike out the application.

Vote Ombudsmen is unable to fund for these one off legal costs and therefore request approval for funding of \$70,000 for 2018/19 only.

International support and leadership

I am wishing to seek the Committee's support for formalising the New Zealand Ombudsman's leadership role in the Asia-Pacific Region in the form of developing a flexible and responsive four-year Asia-Pacific Ombudsman Institutional support programme.

The New Zealand Ombudsman has a long history of supporting the development of international Ombudsman institutions over the last two decades and is committed to not only learning from, but also supporting other nations' integrity organisations - given the vital role they have in ensuring the integrity of well-functioning democracies. To date our engagement has largely taken the form of leadership diplomacy, training and development visits and the sharing of advice and internal resources. Most of our work was funded through the Pacific Ombudsman Alliance (POA) based in the office of the Australian Commonwealth Ombudsman. However, the POA ceased last year due to the withdrawal of Australia's funding support. I now have very limited capability to meet our obligations and continue to contribute to regional stability and support for Ombudsman-type institutions in the Pacific and Asia they are seeking.

New Zealand's own political interest and importance in the Asia-Pacific region is well understood. However, what may not be so well-known is the importance that New Zealand integrity agencies, and in particular my Office, play in promoting accountability, transparency and anti-corrupt practices by supporting integrity agencies in this region. It is clear that these countries are increasingly looking to the New Zealand Ombudsman for leadership and guidance in developing and stabilising its own integrity and justice systems. Our recognition as a leader in promoting good government practices, including transparency and anti-corruption, is not new:

- New Zealand was the first country outside Scandinavia to establish an Ombudsman in 1962.
- Transparency International consistently ranks New Zealand in the top 5 countries perceived as having no corruption. In 2018 we were considered the best in the region, and ranked number 2 in the world.
- The New Zealand Ombudsman is a member of the International Ombudsman Institute (IOI), which is the only global organisation of Ombudsman institutions, and currently

comprises 188 independent Ombudsman member institutions from over 90 countries. Three of our past Chief Ombudsmen have held the Presidency of the IOI.¹⁰ I am currently a Director of the Asia-Pacific Ombudsman Region (APOR) and was recently elected its President.

- The Ombudsman model developed by New Zealand has been widely copied throughout the Ombudsman world and our advice and experience is widely sought by other countries. The systems and processes we employ are now widely viewed as international best practice, and we receive delegations and secondments from various countries each year seeking to establish the Ombudsman role or to learn from our experiences and how our Office functions.¹¹

In February 2019, I will be hosting the Association of Australasian Information Commissioners Conference. In November 2018, I hosted the Australasian Pacific Ombudsman Region (APOR) international conference, where the Minister of Justice on behalf of the Prime Minister delivered the key-note address, acknowledging the importance of my Office's leadership role in the region. I am grateful for the Committee's one-off appropriation to Vote Ombudsman last year, which enabled me to do this.

In November 2018, I was elected the next President of the APOR and will take up this appointment on 1 April 2019. The APOR membership includes:

- All Australia state Ombudsmen
- China - Hong Kong Ombudsman
- Taiwan Control Yuan
- Cook Islands Ombudsman
- Papua New Guinea Ombudsman Commission
- Samoa Ombudsman (Komesina o Sulufaiga)
- Solomon Islands Ombudsman
- Tonga Ombudsman
- Vanuatu Ombudsman
- New Zealand Ombudsman

¹⁰ Sir John Robertson was a Director of the International Ombudsman Institute from 1988 and President of the IOI for two years from 1992 to 1994; Sir Brian Elwood was President of IOI from 1999 to 2003; and Dame Beverley Wakem was President of IOI from 2010 to 2014.

¹¹ In 2017/18 we received delegations from Australia, East Timor and Japan. We also received requests for advice and guidance from Tonga, Samoa and the Cook Islands. In the first six months of the 2018/19 reporting year we received a delegation from Vietnam, provided a four-week placement from Tonga and provided advice and guidance to the Cook Islands.

My appointment as President provides a genuine opportunity for me to further raise New Zealand's profile on the international stage and enhance our role and reputation as a leader in anti-corruption, integrity, transparency, accountability and good decision-making by those with executive power. If the Committee were to support my Office undertaking a four-year Asia-Pacific Ombudsman training and development support programme, I will be able to use my leadership role in APOR, as well as the Office's well-established mana, networks and experience in the region, to assist integrity institutions in these countries. I will work with these institutions to build and improve their monitoring and investigation tools, frameworks, methodologies and resources.

Without our leadership, the opportunity arises for other states to fill the vacuum and establish regimes, practices and models that may not be consistent with ensuring a stable democratic Asia-Pacific region. I note this is a view shared by the Secretary of the Ministry of Foreign Affairs and Trade who has observed that the programme I am proposing is consistent with the Government's Pacific Reset policy and is in support of my Office's proposal. I also observe that New Zealand's Auditor-General who is doing similar work in the region with in respect of audit institutions and currently holds the position of Secretary General and resources the secretariat for the Pacific Association of Supreme Audit Institutions (PASAI).

The New Zealand government invests heavily in providing aid to countries in this region. Ensuring effective integrity mechanisms are operating in these countries will protect New Zealand's investment and promote stability in the region. In a recent report, Dr Peter Adams¹² observed:

"Politics and governance in the Pacific can be fragile, buffeted by fractures in elites or among clan-based families, riven by conflicts of interest, the influence of money, and bad actors from outside. Integrity institutions can be weakened or fail as a result. This damages democracy."

My Office providing training and development support for Ombudsmen or Ombudsman-type anti-corruption and integrity institutions in the Asia-Pacific region will not only improve the public sector capabilities and accountabilities in those countries, but also promotes the operation of stable and effective democratic governance in the region. This includes the openness and transparency of government information, good administrative practice, the disclosure of serious wrongdoing and compliance with international human rights conventions.

Our international engagement activities with other countries in the Asia-Pacific region will also enable us to learn from, as well as assist to develop, international best practice for the benefit of my own operations at the New Zealand Office of the Ombudsman:

- I advised the Committee when we last met that our approach to eliminating our significant backlog and developing an early resolution approach to complaint handling was developed with the advice and experience of the Western Australian Ombudsman and the Queensland Information Commissioner.

¹² An Asia/Pacific Ombudsman International Support Programme, Report by Dr Peter Adams, Wellington December 2018

- The New Zealand population is diverse with many people who now live in our country have come from the broader Asia-Pacific region. Notably, the people of two Pacific self-governing countries, Cook Islands and Niue, are New Zealand citizens and the dependent territory of Tokelau is also part of the Realm of New Zealand. A training and development support programme developed to assist the countries in this region will also give my Office with a deeper understanding of the culture of their communities within New Zealand and improve our delivery to reach out to them.

Due to my oversight role and responsibilities, it is not appropriate for my Office to seek funding from government agencies, such as MFAT and NZAid. Therefore, in order to protect my independence I am seeking the Committee's support to fund my ability to deliver an Asia/Pacific Ombudsman Institutional support programme for 2019-2023 as set out below.

	2019/20 \$(000)	2020/21 \$(000)	2021/22 \$(000)	2022/23 \$(000)
Number of FTE	4	4	4	4
Salaries	582	583	582	582
Other Personnel & Operating	339	478	339	478
Depreciation	11	22	22	22
Capital Charge	4	8	8	8
Total Operating	936	1,091	951	1,090
Total Capital	128	0	0	0

Baseline Updates

Baseline – Permanent Legislative Authority for Ombudsmen remuneration

Supplementary Estimates 2018/19

The Remuneration Authority has issued new determinations for the Chief Ombudsman effective from 1 October 2018. From 1 July 2018, the Chief Ombudsman's single-Ombudsman model commenced. The cost implications for this are also reflected in the table below.

	Impact (\$000s)				
	2018/19 \$(000)	2019/20 \$(000)	2020/21 \$(000)	2021/22 \$(000)	2022/23 & outyears \$(000)
Current Baseline					
PLA Ombudsmen remuneration	703	703	703	703	703
Supplementary Estimates request					
Cost/reduction of new/increased activities	(261)	(247)	(247)	(247)	(247)
PLA Ombudsmen remuneration					
New baseline Ombudsmen remuneration	442	456	456	456	456

Baseline – Annual Appropriation – Office of the Ombudsmen

Supplementary Estimates 2018/19

The current approved baseline for the Annual Appropriation portion of Vote Ombudsmen for 2018/19 is \$18.437 million, excluding PLA funding.

Expense transfer request and timing of expenditure for two projects

In Budget 2018, my Office was given resources for two projects. Due to the delay in my Office receiving confirmation of the 2018/19 budget decision¹³ the office lost early opportunities to select and engage vendors by 1 July 2018 in order to deliver the following projects within the 2018/19 financial year:

- 1) Completion of the Office's Waka Project that comprises Electronic Content Management System and Complaints Management System. The Chief Ombudsman is currently in the process of engaging a suitable vendor. However, until that engagement and their availability is confirmed and a detailed project plan from the successful vendor finalised, we are unsure whether \$0.591 million will be incurred fully in 2018/19 or 2019/20.
- 2) Security projects comprising the assessment of the information and cyber security and implementation of the people and physical security recommendations. The Chief Ombudsman has recently engaged a vendor, and they are now commencing the initial review of the scope of work for these projects. Until the scoping is completed we are unsure how much of \$0.560 million will be incurred in 2018/19.

I therefore request an expense transfer of \$0.400 million from, 2018/19 to 2019/200. However, if the impact of the delay in securing the vendors for these projects results in me being unable to achieve the desired progress in 2018/19, even with the expense transfer above, it may be necessary to seek a further adjustment in Budget 2020 representing any underspend on these projects in 2018/19.

Increase in accommodation costs

Our Auckland, Wellington and Christchurch offices have faced increased office accommodation costs. This is detailed on pages 14-15.

¹³ On 23 May 2018 the Government Administration Committee (GAC) advised Mr Speaker of its intention to examine appropriations in Vote Ombudsman 2018/19 which the Officers of Parliament had recommended *"and decide whether to recommend to the House that they be approved as they stand or with change"*. The GAC released their final decision supporting the appropriations on 11 July 2018.

Increase in legal costs

The office has incurred out of ordinary legal costs for 2018/19. Detail is on page 15.

Operating \$000	2018/19
Current baseline	
Annual Appropriation	18,437
Cost of new initiative	
Increase in accommodation costs	72
Increase in legal costs	70
Expense Transfer	-400
Proposed new baseline – Annual Appropriations	18,179

Main Estimates 2019/20 and outyears

The current baseline and budget request for 2019/20 and outyears for the Annual Appropriation portion of Vote Ombudsmen is as follows:

Operating	2019/20 \$(000)	2020/21 \$(000)	2021/22 \$(000)	2022/23 & outyears \$(000)
Current Baseline				
Annual Appropriation	17,401	17,401	17,175	17,175
Cost of new initiatives				
<i>Operating</i>				
Monitoring places of detention	4,243	6,709	9,136	9,196
Retaining our trained, experienced staff	370	643	922	1,207
Accommodation costs increase	74	74	74	74
International support and leadership	936	1,091	951	1,091
Total cost of new initiatives	5,623	8,517	11,083	11,568
Proposed new baseline - Annual Appropriation	23,024	25,918	28,258	28,743
Capital				
Capital proposals seeking new funding in Budget 2019:				
Monitoring places of detention	1,751	402	568	
International support and leadership	128			
Total Capital Intentions	1,879	402	568	0

Monday 4 March 2019

Rt Hon Trevor Mallard
Chairperson, Officers of Parliament Committee
Parliament Buildings
WELLINGTON

Dear Mr Speaker

ASSESSMENT OF 2019 BUDGET AND BASELINE SUBMISSIONS FOR THE OFFICERS OF PARLIAMENT

Attached to this letter is the Treasury's advice to the Officers of Parliament Committee (OPC) on the 2019 Budget and Baseline Submissions for the Audit Office, the Office of the Ombudsman, and the Parliamentary Commissioner for the Environment.

Our advice is provided for OPC's consideration at the meeting scheduled for 4.00 pm on Thursday 7 March 2019.

The attached annexes provide our assessment of the submissions for each of the three offices and our recommendations for Votes: Audit, Ombudsmen, and Parliamentary Commissioner for the Environment. In each case, the recommendations follow our assessment of the Officer's submission

Should OPC require any further assistance, please contact Geoff Donovan on 917-6016.

Yours sincerely

Simon Duncan
Team Leader, Justice, Security and Government Services

ANNEX 1

CONTROLLER AND AUDITOR-GENERAL

2018/19 Supplementary Estimates and 2019/20 Main Estimates

Summary of Submission

The Auditor-General seeks the following changes:

- updated forecasts for the revenue dependent appropriation for Audit and Assurance Services;
- addressing demand and timeliness;
- investing in their strategy – increasing impact;
- investing in their capability; and
- an adjustment to the Permanent Legislative Authority (PLA).

The Treasury **supports** these changes, and views them as a reset of Vote Audit in light of the new Auditor-General. There has been no significant increase in resources since Budget 2009.

The baseline of Vote Audit with the proposed changes would be:

Revenue dependent appropriation for audits of public entities

	\$000s				
	2018/19	2019/20	2020/21	2021/22	2022/23
Previous Revenue dependent expense	81,309	82,429	86,326	86,329	-
Forecast change in expense	(65)	213	785	105	-
New total expense	81,244	82,642	87,111	86,434	88,233
Previous forecast revenue	80,481	81,876	89,774	85,946	-
Forecast change in revenue	20	(259)	(265)	115	-
Updated forecast revenue	80,501	81,617	89,509	86,061	86,579
Surplus/(Deficit) for the year	(743)	(1,026)	2,398	(373)	(1,654)
Forecast memorandum account balance	1,049	24	2,422	2,049	395

Appropriation adjustments to manage audit deficits

\$000s	2018/19	2019/20	2020/21	2021/22	2022/23
Appropriation required to cover deficit, including buffer	1,400	1,700	-	1,000	2,300
Current baseline for deficit	1,500	1,200	-	1,000	1,000
Adjustment required	(100)	500	-	-	1,300

Annual appropriations for Statutory Auditor Function, and Audit and Assurance Services

		\$000s				
		2018/19	2019/20	2020/21	2021/22	2022/23
Current Annual baseline		11,504	11,204	10,004	11,004	11,004
Appropriation adjustments to manage audit deficits		(100)	500	-	-	1,300
New Initiatives	Addressing demand and improving timeliness	-	1,368	2,042	2,042	2,042
	"Investing in our strategy – increasing impact"	-	1,427	1,712	1,712	1,712
	"Investing in our capability"	-	2,227	2,112	2,112	2,112
New annual baseline sought		11,404	16,726	15,870	16,870	18,170

Permanent Legislative Authority (PLA) for Remuneration of the Auditor-General

		\$000s				
		2018/19	2019/20	2020/21	2021/22	2022/23
Current PLA		1,052	1,052	1,052	1,052	1,052
Adjustment		12	12	12	12	12
New total		1,064	1,064	1,064	1,064	1,064

The Treasury's Assessment

Revenue Dependent Appropriation for audits of public entities

The Treasury **supports** the forecast changes.

The Auditor-General is required to administer audits of Crown agencies, local bodies and other bodies for which the costs are recovered from the bodies being audited.

The expense for these audits is reflected through a revenue dependent appropriation where expense is limited by the revenue received. The Auditor-General has reforecast both the expenses and revenues expected for this appropriation. Movement in the expenses is due to an increase in fees charged to the Audit Office by the Audit providers (AuditNZ and private providers) of 2.5% reflecting increases to personnel costs (1.5% to 2%) and for accommodation costs (2%). In addition, the auditing of local government Long Term Plans, a three-yearly requirement, is reflected in the forecast for 2020/21.

Appropriation adjustments to manage audit deficits

The Treasury **supports** the adjustments to the appropriations required to offset the forecast deficits.

The Auditor-General operates a memorandum account to record the revenue and expenses of the audits. This enables surpluses in one year to be offset by deficits in another year and allows charging to be varied following the accumulation of surpluses or deficits. However, in

a year in which a deficit is forecast to occur, an annual appropriation is necessary to cover the expense in excess of revenue. The revenue required to support this expense is already held in the Office's bank account from previous years. To ensure that no unappropriated expense is incurred, the baseline includes a buffer of approximately \$700,000.

The Office is forecasting deficits, charged to the memorandum account, of \$743,000 in 2018/19; \$1,026,000 in 2019/20 and \$1,654,000 in 2022/23.

The baseline has been adjusted for changes in the forecast deficit by \$100,000 in 2018/19; \$500,000 in 2020/21; and \$2,300,000 in 2022/23.

The memorandum account is forecast to have a surplus of \$1,049,000 on 30 June 2019 and fluctuate to a surplus of \$395,000 at the end of 2022/23.

New Initiatives

The Treasury **supports** the Auditor-General's new initiatives and views them as a reset of his Office under the new Auditor-General. There has been no significant increase in resources since the 2009 Budget.

Addressing demand and improving timeliness

This initiative has two components:

- Improving coverage and timeliness of performance audits; and
- Addressing demand and timeliness of the inquiries function.

The Audit Office completes approximately 10 performance audits each year which are often referred to and widely quoted. There are many entities in the public sector where reports such as these could provide benefit for the agency and to the Government. Some agencies with very large expenditure have not had a performance audit undertaken during the past five years. Currently, performance audits often take 10 – 11 months to complete. With an increase in resource, the aim is to reduce the time taken to less than nine months and deliver 75% of these performance reports and other projects within this timeframe.

The Auditor-General is also required to carry-out inquiries that focus on the use of resources by public entities which are complex and often of a high interest. Demand for inquiries has grown steadily in recent years. The current team of 4.5 FTEs is limited in the work that it can perform. The additional resource sought would assist in dealing with the increasing demands for this work.

"Investing in our strategy - increasing impact"

This initiative has three components:

- Development and publication of new good practice guidance;
- Increased engagement with entities; and
- Better use of data to generate insight and get ahead of issues.

The Auditor-General proposes to develop and publish new good practice guidance. A 2018 survey of stakeholders in the public sector revealed that they see value in the Office using its experience and knowledge of other areas to provide better guidance.

While the Audit Office's existing guidance is seen to provide sound information, the most recent of these was published in 2012. The Auditor-General proposes to develop a programme for the development of new guidance and a process for their regular review and refresh.

Along with the refresh and development of new guidance, the Auditor-General believes it is necessary to increase his engagement with agencies. He considers this critical to improve understanding and advice to agencies, as well as be in a better position to advise Parliament when appropriate.

The Auditor-General proposes greater use of data to get a better insight into issues and help get ahead of them. The Office holds a wide range of data from their audit and inquiry work and the present use of this has proved labour intensive and time consuming.

This initiative will enable the Office to engage data analysts to further develop deeper and more robust analysis which will assist in the preparation of select committee reports and enhance the quality of their published reports.

“Investing in our capability”

This initiative has five components:

- Technical development and quality assurance;
- Improving core system development;
- Expanding the use of technology to support their work;
- Enhancing processes and systems to support delivery; and
- Investing in their people.

The Auditor-General expects a general shift towards outcomes and other changes likely to affect public sector accountability requirements will require an increase in capacity for technical development and quality assurance requirements.

This will also require an improvement in core system capability. The current Audit Status Database is over 10 years old, and while it has had a number of enhancements, there is currently a list of over 300 change requests for improvements. There is now a need for new functionality as the present system is no longer economic to maintain and requires replacement.

Along with a new system, the Auditor-General wishes to explore other technology related opportunities to keep pace with technological developments, particularly those used internationally by other Audit Offices.

To assist with managing the Audit Office’s significant programme of work, the Auditor-General requires resources to manage improved strategy and business planning; monitoring delivery and coordinating reporting against the work programme; developing tools and templates; and, developing a centralised system for correspondence across the Office.

Staff turnover in the Audit Office was between 15 to 20% in the last year. In some key areas it has been up to 40%. To address this issue, a small increase has been sought to ensure that the remuneration framework remains attractive and comparable to other similar organisations.

Adjustment to the Permanent Legislative Authority (PLA) for Remuneration of the Auditor-General

The PLA has been adjusted as a result of determinations issued by the Remuneration Authority. As the Audit Office has no control over this adjustment, the Treasury **concurs** with the action taken.

Recommendations

It is recommended that the Officers of Parliament Committee:

1. **agree**, in the annual appropriation Audit and Assurance Services, to the changes in the table below, to cover the forecast deficits, which are funded from accumulated surpluses from previous years (memorandum account):

	2018/19	2019/20	2020/21	2021/22	2022/23
Appropriation adjustment to manage audit deficits	(\$100,000)	\$500,000	-	-	\$1,300,000

2. **agree** to the new annual appropriation for 2018/19:

Annual appropriation	\$
Current baseline	11,504,000
Adjustment for deficit	(100,000)
New baseline	11,404,000

3. **agree** to the new annual appropriation for 2019/20:

Annual appropriation	\$
Current baseline	11,204,000
Adjustment for deficit	500,000
Addressing demand and timeliness	1,368,000
Investing in our strategy – Increasing impact	1,427,000
Investing in our capability	2,227,000
Total	16,726,000

4. **note** the change in the PLA;
5. **agree** that the changes for 2018/19 (increase in PLA and decrease in annual appropriation) be included in the 2018/19 Supplementary Estimates;
6. **agree** that the new annual baselines (including PLA for remuneration and the annual appropriation to cover forecast deficits in the audit and assurance services memorandum account but excluding the revenue dependent appropriation) be:

\$	2020/21	2021/22	2022/23
New annual baseline	16,934,000	17,934,000	19,234,000

ANNEX 2

OFFICE OF THE OMBUDSMAN

2018/19 Supplementary Estimates and 2019/20 Main Estimates

Summary of Submission

The Chief Ombudsman seeks the following additional resources and changes:

- increased costs of accommodation;
- retaining trained, experienced staff;
- monitoring places of detention;
- international support and leadership;
- additional legal costs; and
- an update of the Permanent Legislative Authority (PLA) for the Chief Ombudsman's remuneration.

The impact on the baseline of the requested changes would be:

	\$000s				
	2018/19	2019/20	2020/21	2021/22	2022/23
Current Annual baseline	18,437	17,401	17,401	17,175	17,175
Retaining trained, experienced staff	-	370	643	922	1,207
Monitoring places of detention	-	4,243	6,709	9,136	9,196
International support and leadership	-	936	1,091	951	1,091
Increased costs of accommodation	72	74	74	74	74
Additional legal costs	70	-	-	-	-
Expense transfer	(400)	400	-	-	-
Total new annual appropriation sought	18,179	23,424	25,918	28,258	28,743

	\$000s				
	2018/19	2019/20	2020/21	2021/22	2022/23
PLA	703	703	703	703	703
New determination and adjustment	(261)	(247)	(247)	(247)	(247)
New PLA total	442	456	456	456	456

Taxpayers' Fund – Capital

	\$000s				
	2018/19	2019/20	2020/21	2021/22	2022/23
Taxpayers' funds	4,442	4,442	6,766	6,766	6,766
Accounting adjustment	-	3	-	-	-
Monitoring places of detention	-	1,751	402	568	-
International support and leadership	-	128	-	-	-
New total	4,442	6,766	6,766	6,766	6,766

Assessment

The Chief Ombudsman seeks additional resources to support:

- retaining trained, experienced staff;
- monitoring places of detention;
- international leadership and support;
- additional accommodation costs; and
- additional legal costs.

New Operating Initiatives

Retaining trained, experienced staff

The Chief Ombudsman is seeking an increase to enable him to retain staff on the "All Orgs" rates in 2019 in line with previous adjustments. He also seeks the ability to make a performance payment (up to 2.2%) to his staff. The staff in the Office are highly trained and there is breadth and complexity of work involved. Training can take at least a year. Remuneration adjustments have assisted in reducing the voluntary staff turnover to 7.5% rather than the 20% and 18% of previous years. As a result the performance of the Office has improved considerably – 95% of Official Information Act complaints being cleared within nine months of receipt.

We also acknowledge that there is only one Ombudsman and this is the intended model for the foreseeable future.

However, while the Treasury agrees with the salaries remaining aligned with the "All Orgs" rates, it does not consider that it is appropriate to include in baselines provision for ongoing salary increases and accordingly **supports** a more modest sum.

Monitoring places of detention

The United Nations agreed to an Option Protocol against Torture (OPCAT) in 2003 and the New Zealand committed to this protocol in 2007 when adopting the amendments to the New Zealand Crimes of Torture Act 1989.

The Ombudsman is designated as a National Preventive Mechanism (NPM) and is required to inspect and report on the facilities and treatment of people detained in New Zealand's prisons, health and disability places of detention, youth justice and child care and protection residences, and immigration detention facilities. The Ombudsman identified 110 facilities that fell within his jurisdiction and has been monitoring and reporting on these as required.

In June 2018, the Government expanded the role of OPCAT to include people detained by the Department of Corrections (outside of those in prisons) in court facilities, and privately run aged care facilities.

The expansion has significantly increased the number of facilities within the Ombudsman's jurisdiction:

- 227 privately run aged care facilities;
- 58 court locations; and
- additional locations when in custody of the Department of Corrections such as prison vans, hospitals and employment.

The Chief Ombudsman proposes to increase the resources to undertake this work by appointing additional investigators – 17 in 2019/20, a further 9 in 2020/21, and 9 in 2021/22.

This phased additional resource requires \$4,243,000 in 2019/20, \$6,709,000 in 2020/21, \$9,136,000 in 2021/22, and \$9,196,000 in 2022/23 and outyears.

As this is an additional requirement given the expansion of the role, the Treasury **supports** the additional resources being sought.

International leadership and support

The Chief Ombudsman has been elected, and assumes the role on 1 April 2019, of President of the Australasian Pacific Ombudsman Region (APOR).

The Chief Ombudsman has proposed a programme, limited to four years, of work in the Pacific. He wishes to engage four FTE's in a leadership and support role.

This follows the increasing focus of New Zealand Government aid in that area and is consistent with the Government's Pacific Reset policy.

His interest is in promoting accountability, transparency and anti-corruption practices by supporting integrity agencies and promoting the operation of stable and effective democracies in the region.

The Treasury **supports** this initiative.

Additional accommodation costs

The rentals and operating costs for all three locations of the Ombudsman's office has been reviewed and increases are being charged. In the cases of the Auckland and Wellington offices, an independent reviewer has determined that the increases are reasonable. In the case of the Christchurch office, the rental review indicated minimal change, but the building manager has advised an increase in operating costs.

The Treasury **supports** the additional \$72,000 in 2018/19 and \$74,000 from 2019/20.

Additional legal costs

In the current financial year the Chief Ombudsman has had to incur unexpected legal costs arising from:

- a judicial review of his decision to decline an application to use the name Ombudsman by a private sector entity; and
- a judicial review of proceedings against a public sector agency where the plaintiff has sought to join the Ombudsman in the proceedings which he is seeking to strike out.

The Treasury **supports** the additional \$70,000 being sought.

Expense transfers

In Budget 2018, the Ombudsman was granted additional resources for two projects:

- Electronic Content Management System; and
- Security projects including cyber security.

While planning for these projects is well underway and vendors have been chosen or are being selected, it is unclear how much expense will be incurred in 2018/19. The Chief Ombudsman has requested an expense transfer of \$400,000 to 2019/20. He also notes that he may seek further resources in Budget 2020 if the underspend in 2018/19 is significantly less than the \$400,000 above.

The Treasury **supports** the expense transfer of \$400,000 to 2019/20.

Permanent Legislative Authority

The Remuneration Authority has issued a new determination in respect of the Chief Ombudsman's remuneration. However, the decision not to replace an ombudsman requires an adjustment which will reduce the PLA.

The Treasury **supports** this adjustment.

Capital

Capital injections of \$1,879,000 in 2019/20, \$402,000 in 2020/21, and \$568,000 in 2021/22 are required to support the initiatives proposed by the Chief Ombudsman.

The Treasury **supports** this request.

Conclusion

The overall impact of the changes sought by the Chief Ombudsman (excluding expense transfers) and the recommendations made by the Treasury are to increase the current operating baseline as shown below:

	2019/20	2020/21	2021/22	2022/23
Ombudsman request	\$5,623,000	\$8,517,000	\$11,084,000	\$11,568,000
% increase	32	49	65	67
Treasury recommendation	\$5,623,000	\$8,244,000	\$10,531,000	\$10,731,000
% increase	32	47	61	62

Recommendations:

It is recommended that the Officers of Parliament Committee:

1. **agree** to support the following operating initiatives in 2018/19, 2019/20 and outyears:

Expenses initiative	\$000s				
	2018/19	2019/20	2020/21	2021/22	2022/23
Retaining trained, experienced staff	-	370	370	370	370
Monitoring places of detention	-	4,243	6,709	9,136	9,196
Additional accommodation costs	72	74	74	74	74
International support and leadership	-	936	1,091	951	1,091
Additional legal costs	70	-	-	-	-
Expense transfer	(400)	400	-	-	-
Total supported	(258)	6,023	8,244	10,531	10,731

2. **note** that recommendation 1 above includes all the Chief Ombudsman's new initiatives except for provision for cumulative remuneration increases;
3. **note** the adjustment to the PLA to reflect the movement in the Chief Ombudsman's remuneration;
4. **agree** to the changes in the annual appropriation in 2018/19 (existing baseline \$18,437,000 less \$258,000 to \$18,179,000);
5. **agree** to a total annual appropriation in 2019/20 of \$23,424,000 (existing baseline of \$17,401,000 plus \$6,023,000) in Vote Ombudsmen, Output expense: Investigation and Resolution of Complaints about Government administration;
6. **agree** to capital injections of \$1,879,000 in 2019/20; \$402,000 in 2020/21; and \$567,000 in 2021/22;
7. **agree** to a new annual baseline (including PLA) of \$26,101,000 in 2020/21, \$28,162,000 in 2021/22, and \$28,362,000 in 2022/23; and
8. **agree** to incorporate the changes in 2018/19 (reduction in expense and PLA (under recommendations 1 and 3 above)) into the 2018/19 Supplementary Estimates.

ANNEX 3

PARLIAMENTARY COMMISSIONER FOR THE ENVIRONMENT

2018/19 Supplementary Estimates and 2019/20 Main Estimates

The Parliamentary Commissioner for the Environment seeks the following change:

- an adjustment to the Permanent Legislative Authority (PLA) for the Commissioner's salary.

The following tables show the baselines for the Vote:

	\$000s				
	2018/19	2019/20	2020/21	2021/22	2022/23
Annual baseline	3,362	3,362	3,362	3,362	3,362

	\$000s				
	2018/19	2019/20	2020/21	2021/22	2022/23
PLA	336	336	336	336	336
2018 Determination	1	1	1	1	1
New total	337	337	337	337	337

Assessment

Increase in PLA

The increase arises from a determination issued by the Remuneration Authority. As the Commissioner has no authority over these costs, the Treasury **supports** the increase required in revenue Crown.

There are no other changes proposed to this Vote for Budget 2019.

Recommendations

It is recommended that the Officers of Parliament Committee:

- 1 **note** the increase in the PLA for the remuneration of the Commissioner in 2018/19 and outyears;
- 2 **agree** to the annual appropriation of \$3,362,000 in 2019/20 for Vote Parliamentary Commissioner for the Environment, Output Expense: Reports and Advice;

- 3 **agree** to the change in 2018/19 (PLA adjustment) being included into the 2018/19 Supplementary Estimates; and
- 4 **agree** to a new annual baseline (including PLA) of \$3,699,000 from 2020/21.



Alterations to the 2018/19 appropriations for Vote Audit, Vote Ombudsmen, and Vote Parliamentary Commissioner for the Environment, and 2019/20 draft budgets for the Office of the Controller and Auditor-General, the Office of the Ombudsman, and the Office of the Parliamentary Commissioner for the Environment

Report of the Officers of Parliament Committee

Fifty-second Parliament
(Rt Hon Trevor Mallard, Chairperson)
March 2019

Presented to the House of Representatives

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Alterations to the 2018/19 appropriations for Vote Audit, Vote Ombudsmen, and Vote Parliamentary Commissioner for the Environment, and 2019/20 draft budgets for the Office of the Controller and Auditor-General, the Office of the Ombudsman, and the Office of the Parliamentary Commissioner for the Environment

Recommendation

The Officers of Parliament Committee recommends that the House commend to the Governor-General, by way of an address pursuant to section 26E of the Public Finance Act 1989:

- alterations to the 2018/19 appropriations for Vote Audit, Vote Ombudsmen, and Vote Parliamentary Commissioner for the Environment
- estimates of expenses to be incurred for each appropriation in 2019/20 in Vote Audit, Vote Ombudsmen, and Vote Parliamentary Commissioner for the Environment
- capital injections to the Office of the Ombudsman

and requests that they be incorporated into an Appropriation Bill.

Introduction

In order to maintain the independence of the Officers of Parliament, the Public Finance Act 1989 provides for funding for the Office of the Controller and Auditor-General, the Office of the Ombudsman, and the Office of the Parliamentary Commissioner for the Environment to be determined by Parliament through the Officers of Parliament Committee.

We received submissions from each officer detailing proposed alterations to their 2018/19 appropriations, and their draft budgets for 2019/20 and out-years. We examined these submissions in conjunction with advice from the Treasury. Our recommended alterations for 2018/19, and estimates for 2019/20 and out-years, are detailed in this report.

We recommend that the House commend these alterations and estimates to the Governor-General for inclusion in the main Appropriation Bill for the coming financial year, or in the Appropriation Bill dealing with the Supplementary Estimates for the current financial year. All figures in this report are GST-exclusive or GST-exempt unless otherwise noted.

Office of the Controller and Auditor-General

Alterations to the 2018/19 appropriations for Vote Audit

Audit and Assurance Services revenue-dependent appropriation (RDA)

The Auditor-General carries out the audits of Crown agencies, local authorities, and other bodies and recovers costs from the bodies being audited. The Auditor-General has reforecast the expenses and revenue expected for the revenue dependent appropriation *Audit and Assurance Services* which covers this work. A reduction of \$100,000 has been forecast for 2018/19.

We recommend that this change be incorporated into the 2018/19 Supplementary Estimates.

Other matter: Salaries funded under PLA

The salaries of the Auditor-General and Deputy Auditor-General are determined by the Remuneration Authority, and are funded under permanent legislative authority (PLA). Any adjustments are implemented automatically. We note an increase in the PLA of \$12,000 in 2018/19 and out-years.

The following table shows the effect of these changes for 2018/19.

Alteration for 2018/19	\$000
Current annual appropriation	11,504
Adjustment to manage audit deficits	(100)
New annual appropriation for 2018/19	11,404
PLA	1,064
New baseline (annual and PLA) for 2018/19	12,468

2019/20 draft budget for the Office of the Controller and Auditor-General

Audit and Assurance Services revenue-dependent appropriation (RDA)

The appropriation for Audit and Assurance Services covers the expenses incurred by the Auditor-General in auditing Crown agencies, local authorities, and other entities for which the Auditor-General has auditing responsibility. The appropriation is a revenue-dependent appropriation. That is, the annual expense that can be incurred under the RDA is limited to the amount of revenue derived from the entities audited. Audit fee forecasts are updated annually according to the expected amount of audit activity.

The Auditor-General has reforecast expenses and revenue for this appropriation. The following changes in expenses are expected:

- an increase in the fees charged to the Audit Office by the audit providers (Audit NZ and private providers) of 2.5 percent a year, reflecting expected increases in the cost of the auditing workforce and accommodation
- the auditing of local government Long Term Plans is reflected in the forecast for 2020/21.

Forecast deficits in the appropriation

The Auditor-General operates a memorandum account for its audits, enabling surpluses in one year to be offset by deficits in another year, and allowing charges to be varied following the accumulation of surpluses or deficits.

An annual appropriation is required for years in which deficits are expected in order to cover expenses in excess of revenue, even though the revenue required to support the deficit is in the office's bank account from previous years. A buffer of approximately \$700,000 is provided to avoid any unappropriated expenditure.

The Auditor-General is forecasting deficits, charged to the memorandum account, of \$743,000 in 2018/19, \$1,026,000 in 2019/20, and \$1,654,000 in 2022/23.

At the end of 2018/19, the accumulated surplus in the memorandum account is forecast to be \$1,049,000 and fluctuates to a surplus of \$395,000 at the end of 2022/23.

We recommend the following adjustments in the annual appropriation for Audit and Assurance Services to take account of the revised forecasts:

- 2020/21: an increase of \$500,000
- 2022/23: an increase of \$1,300,000.

We note that the Treasury has examined and supports the forecast changes.

New initiatives

The Auditor-General seeks Crown funding for three new initiatives. We note that there has been no significant increase in resources in Vote Audit since the 2009 Budget.

“Addressing demand and improving timeliness”

This initiative has two elements:

- improving coverage and timeliness of performance audits
- addressing demand and timeliness of the Auditor-General's inquiry function.

The Audit Office completes around 10 performance audits a year and each can take between 10 and 11 months to complete. We were advised that some agencies with very large expenditure have not had a performance audit in the last five years. The aim of this initiative is to deliver performance audit reports and other projects within nine months.

The Auditor-General is also required to undertake inquiries into the use of resources by public entities. Demand for such inquiries has been steadily increasing. However, the current team, at 4.5 full-time-equivalent staff (FTEs), is limited in the work it can do. Additional funding is sought to increase capacity.

“Investing in our strategy – increasing impact”

This initiative has three elements:

- development and publication of new good practice guidance
- increasing engagement with entities
- better use of data to generate insight and get ahead of issues.

The Auditor-General already publishes guidance which is seen to provide good information to public sector stakeholders. However, the last of this guidance was published in 2012. The Auditor-General proposes to develop new guidance that will be regularly reviewed and refreshed.

The Auditor-General also proposes to engage data analysts to develop more robust analysis of the data held as a result of the audit and inquiry work undertaken. The Auditor-General believes this will assist in the preparation of select committee reports and improve the quality of his published reports.

Along with new guidance documents and better use of data the Auditor-General plans to increase engagement with other agencies. He believes it will improve knowledge of and advice to those agencies, and he will be able to provide better advice to Parliament when required.

“Investing in our capability”

This initiative has five elements:

- technical development and quality assurance
- improving core system development

- expanding the use of technology to support the Office's work
- enhancing processes and systems to support delivery
- investing in people.

The Auditor-General's current Audit Status Database is over 10 years old and has over 300 change requests for improvements. The system is no longer economic to maintain and requires replacement to facilitate new functionality. The Auditor-General also wants to explore other technical opportunities, particularly those used by other Audit Offices internationally.

To help manage strategy and business planning, monitoring the delivery of reporting against the work programme, and the development of tools, templates, and a centralised correspondence system the Auditor-General is seeking additional resources.

Finally, the turnover in the Audit Office has been between 15 and 20 percent, but up to 40 percent in some key areas. To make sure the remuneration framework is competitive, a small increase is sought.

Other matter: Salaries funded under PLA

As noted above, the Remuneration Authority determines the salaries of the Auditor-General and Deputy Auditor-General. These costs are funded under permanent legislative authority (PLA), and any adjustments are implemented automatically. We note an increase in the PLA of \$12,000 in 2019/20 and out-years.

Summary of proposed changes

The following table shows the effect that our recommended changes, and the adjustment to the PLA, would have on the Vote Audit baseline.

Adjustments for 2019/20 and out-years	2019/20 \$000	2020/21 \$000	2021/22 \$000	2022/23 \$000
Current annual appropriation	11,204	10,004	11,004	11,004
Adjustment for audit and assurance deficits	500	-	-	1,300
Adjustment for Addressing demand and improving timeliness	1,368	2,042	2,042	2,042
Adjustment for Investing in our strategy – increasing impact	1,427	1,712	1,712	1,712
Adjustment for Investing in our capability	2,227	2,112	2,112	2,112
New annual appropriation	16,726	15,870	16,870	18,170
Current PLA	1,064	1,064	1,064	1,064
New baseline (annual and PLA)	17,790	16,934	17,934	19,234

Office of the Ombudsman

Alterations to the 2018/19 appropriations for Vote Ombudsmen

We recommend the following adjustments to the appropriations for the Office of the Ombudsman in 2018/19.

Increased costs of accommodation

The rental and operating costs for all three office locations have been reviewed and are increasing. We support an additional \$72,000 to meet these increasing costs.

Additional legal costs

In 2018/19 the Ombudsman has had unexpected legal costs arising from a judicial review of his decision to decline an application to use the name Ombudsman by a private sector entity. There is also a judicial review of proceedings against a public sector agency where a plaintiff has sought to join the Ombudsman, which the Ombudsman is seeking to strike out.

We support an additional \$70,000 to meet these costs.

Expense transfer

In Budget 2018 the Ombudsman was granted additional funding for two projects:

- Electronic Content Management System
- Security projects including cyber security.

We support an expense transfer of \$400,000 to 2019/20 as it is not clear how much expense will be incurred in 2018/19. We understand that should there be further delay to the projects, and additional underspending, the Chief Ombudsman may request further funding for 2020/21 which will be offset by funding returned to the Crown at the end of the current 2018/19 year.

Ombudsmen's remuneration: funding under PLA

The salaries of any Ombudsmen are revised annually on the basis of determinations by the Remuneration Authority, and funded under permanent legislative authority (PLA).

We note a decrease in the PLA of \$261,000 in 2018/19 and \$247,000 in out-years as a result of a determination by the Remuneration Authority and the decision not to replace an Ombudsman. Such adjustments are implemented automatically.

Summary of changes

The following table summarises the alterations for 2018/19 that we recommend be incorporated into the 2018/19 Supplementary Estimates, and the effect of the changes to the PLA.

Alterations for 2018/19	\$000
Current annual appropriation	18,437
Increased costs of accommodation	72
Additional legal costs	70
Expense transfer	(400)
Net change in appropriation	(258)
New appropriation for 2018/19	18,179
Current PLA	703
Adjustment for remuneration determination	(261)
New PLA	442
New baseline (annual and PLA) for 2018/19	18,621

2019/20 draft budget for the Office of the Ombudsman

Recommendations for 2019/20 appropriations and out-years

We discuss below our recommended adjustments to the appropriations for the Office of the Ombudsman for 2019/20 and out-years in the following areas:

- retaining trained, experienced staff
- monitoring places of detention
- international leadership and support
- increased costs of accommodation.

Retaining trained, experienced staff

The Ombudsman is seeking an increase to enable him to retain staff on the “All Orgs” rates for 2019/20 and out-years, and to make a performance payment of up to 2.2 percent to staff. Whilst we agree that maintaining the alignment to the “All Orgs” rates in 2019/20 is important, we do not support inclusion of increases in out-years.

During our hearing the Chief Ombudsman indicated that he is happy with an increase in 2019/20, and should further increases be required in out-years he may come back to the committee at that time. We support an increase of \$370,000 in 2019/20.

Monitoring places of detention

The Ombudsman is required, under the New Zealand Crimes of Torture Act 1989, to inspect and report on facilities and treatment of people in New Zealand’s prisons, health and disability places of detention, youth justice and child care and protections residences, and immigration detention facilities. This amounts to 110 facilities. In 2018 this role was expanded to include people detained in Department of Corrections court facilities and privately run aged care facilities.

The facilities now in the Ombudsman’s jurisdiction include:

- 227 privately run aged care facilities
- 58 court locations
- additional locations when in Department of Corrections custody such as prison vans, hospitals, and employment.

To meet this requirement the Chief Ombudsman proposes to employ an additional 17 investigators in 2019/20, 9 in 2020/21, and 9 in 2021/22. We support additional funding of:

- \$4,243,000 in 2019/20
- \$6,709,000 in 2020/21
- \$9,136,000 in 2021/22
- \$9,196,000 in 2022/23 and out-years.

International leadership and support

On 1 April 2019 the Chief Ombudsman assumes the role of President of the Australasian Pacific Ombudsman Regions (APOR). He proposes a 4 year programme of work consistent with the Government's Pacific Reset Policy, and wishes to engage four FTEs in leadership and support roles. The programme will focus on promoting accountability, transparency, and anti-corruption practices by supporting integrity agencies and the operation of stable and effective democracy.

Additional accommodation costs

As noted above, the rental and operating costs for all three office locations (Auckland, Wellington, and Christchurch) have been reviewed and are increasing. We support an additional \$72,000 in 2018/19 and \$74,000 in 2019/20 and out-years to meet these increasing costs.

Capital injections

Capital injections of \$1,879,000 in 2019/20, \$402,000 in 2020/21 and \$568,000 in 2021/22 are required to support the initiatives for Monitoring places of detention and International support and leadership.

Ombudsmen's remuneration: funding under PLA

We note the decrease of \$247,000 in the permanent legislative authority for 2019/20 and out-years as a result of a determination by the Remuneration Authority and the decision not to replace an Ombudsman.

Summary of proposed changes

The following table shows the effect of our recommended changes, and the adjustment in the PLA, on the 2019/20 appropriation for Vote Ombudsmen and the baseline for subsequent years.

Adjustments for 2019/20 and out-years	2019/20 \$000	2020/21 \$000	2021/22 \$000	2022/23 \$000
Current annual appropriation	17,401	17,401	17,175	17,175
Retaining trained and experienced staff	370	370	370	370
Monitoring places of detention	4,243	6,709	9,136	9,196
International support and leadership	936	1,091	951	1,091
Increased costs of accommodation	74	74	74	74
Expense transfer	400	-	-	-
Total adjustment	6,023	8,244	10,531	10,731
New annual appropriation	23,424	25,645	27,706	27,906
Current PLA	703	703	703	703
Adjustment for remuneration determination	(247)	(247)	(247)	(247)
New PLA	456	456	456	456
New baseline (annual and PLA)	23,880	26,101	28,162	28,362

	2019/20	2020/21	2021/22	2022/23
Current capital	6,763	8,645	9,047	9,615
Capital injection comprising:				
Accounting adjustment	3	-	-	-
Monitoring places of detention	1,751	402	568	-
International support and leadership	128	-	-	-
New total capital	8,645	9,047	9,615	9,615

Parliamentary Commissioner for the Environment

Alterations to the 2018/19 appropriations for Vote Parliamentary Commissioner for the Environment

Adjustment for salaries funded under PLA

The salary of the Parliamentary Commissioner for the Environment is revised annually on the basis of determinations by the Remuneration Authority, and funded under permanent legislative authority (PLA).

We note an increase in the PLA of \$1,000 in 2018/19 and out-years as a result of a determination by the Remuneration Authority. Such adjustments are implemented automatically.

The change for 2018/19 will be incorporated automatically into the 2018/19 Supplementary Estimates.

The following table shows the effect of this change on the Vote's baseline.

Alteration for 2018/19	\$000
Current annual appropriation	3,362
Current PLA	336
Adjustment for remuneration determination	1
New PLA	337
New baseline (annual and PLA) for 2018/19	3,699

2019/20 draft budget for the Office of the Parliamentary Commissioner for the Environment

We note the increase of \$1,000 in the PLA for 2019/20 and out-years as a result of a determination by the Remuneration Authority to increase the Commissioner's remuneration.

No other changes are sought by the Parliamentary Commissioner for the Environment or recommended by the committee.

Summary of proposed changes

The following table shows the effects of these changes on the 2019/20 appropriation for Vote Parliamentary Commissioner for the Environment, and the baseline for subsequent years.

Adjustments for 2019/20 and out-years	2019/20 \$000	2020/21 \$000	2021/22 \$000	2022/23 \$000
Current annual appropriation	3,362	3,362	3,362	3,362
Current PLA	336	336	336	336
Adjustment for remuneration determination	1	1	1	1
New PLA	337	337	337	337
New baseline (annual and PLA)	3,699	3,699	3,699	3,699

Appendix

Committee procedure

We met on 7 March 2019 to consider the alterations to the 2018/19 appropriations and the draft budgets for 2019/20 for the Officers of Parliament. We heard evidence from the Chief Ombudsman, the Controller and Auditor-General, and the Parliamentary Commissioner for the Environment, and received advice from the Treasury.

Committee members

Rt Hon Trevor Mallard (Chairperson)
Hon Ruth Dyson
Gareth Hughes
Barbara Kuriger
Clayton Mitchell
Hon Anne Tolley

Advice and evidence received

We received the following documents as advice and evidence. They are available on the Parliament website, www.parliament.nz.

- Treasury Assessment of 2019 Budget and Baseline Submissions for the Officers of Parliament
- Parliamentary Commissioner for the Environment (Budget 2019)
- Ombudsman (Budget 2019)
- Office of the Controller and Auditor-General (2019 Budget)
- Office of the Controller and Auditor-General (2019 Budget) Supp1